EQUITY
in its Relations to Common Law

A STUDY IN LEGAL DEVELOPMENT

BY
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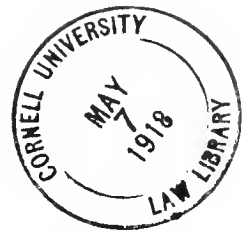

Preface

The scope of the following inquiry into the bearings of equity upon common law is indicated roughly by the questions which will be found raised upon its first three pages. Chiefly the work is a search for the correct answers to those questions, which, though long mooted, appear never to have received as systematic discussion as they deserve, considering how vitally they concern the origin, nature, functions, and limitations of equity.

The view here taken is that equity has not been restricted, as has been contended by many, to the relief of such common law defects as were due to inadequacies of procedure, but has had for its province as well to enforce a superior morality by relieving in the interest of good conscience against many types of defects in the substantive law; that its root is in the sovereign prerogative of grace in civil matters, a naturally appointed agency of great value for the amelioration of law in both its substantive and its remedial phases, before the arts of refined interpretation and legislation are matured — the same prerogative to which the Roman Praetor accredited his boons.

The evolutional value of the prerogative is discussed and illustrated, its workings in Rome and in England compared, the processes described by which its detached and sporadic acts of grace tend ultimately to harden into a distinct body of law, and an attempt made to point out and classify the directions in which equity has assumed to enforce her more highly moralized standards and methods in counteraction of the substantive law.

The general theory of the subject is fully developed in the first five chapters, at the close of which are enumerated the lines, nine in number, along which equity seems to have relieved from imperfections in the common law not referable to procedural incapacity. The remaining chapters seek to verify the view taken, by exhibiting in detail the activities of English equity along these several lines. The original purpose of the author was so to trace the workings of equity in all of the nine indicated directions. Impairment of health has required a discontinuance of the work after dealing only with the three first in order and importance — equity's peculiar regard for substance at the expense of forms, her doctrines of fraud, and her doctrines of uses and trusts. If, however, the work as it stands amply demonstrates the accuracy of its general conceptions of equity, as the author ventures to believe that it does, the missing chapters could have added but little to its value.

William W. Billson.

Duluth, August 1st, A.D. 1916.

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Equity in its Relations to Common Law

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CHAPTER I

THE CONFLICTING THEORIES OF EQUITY JURISDICTION

Legislation looking toward the merger of law and equity has now so far progressed throughout the English-speaking world that as a distinct jurisprudence English equity must be considered to have run substantially its unique and enigmatic course. It is a singular circumstance that the five centuries, approximately, during which we have administered, and in a sense worn out, the distinction between the two systems, have not enabled us to agree what the distinction is.

Were the defects of the common law which called equity into existence defects of procedure only? Or had equity an ethical quality, which on ultimate analysis was perhaps her most distinctive and fruitful trait? Were the moral and rational standards of the two systems substantially the same, or independently of her superior remedial equipment was it primarily and largely a function of equity to enforce, within vaguely defined limits, standards more refined and more searching than those that often were tolerated by common law? Did equity insist upon regulating by exercise of public authority tracts of conduct which the common law deliberately excluded from her own domain as being

matters of morality only? Were there in the substantive common law rigors which it was an office of equity to mitigate; deficiencies not ultimately referable to mere remedial incapacity, which equity was authorized to supply; rights an unconscionable exercise of which equity might curb; forms with which it was the privilege of equity to dispense? To what is this rift in our jurisprudence to be ascribed? Was it an accidental English provincialism, due to the fact that at a critical period the incumbents of the common law benches happened to be men abnormally addicted to precedent and technicality; or is it traceable in whole or in part to the same racial characteristics that explain so many other distinctive features of English law? May it even be that the innovating activities alike of the Praetor in Rome and the Chancellor in England were rooted in very general laws of thought which at certain stages of development tend thus to produce a more or less distinct duality in the law? Were the innovations of both Praetor and Chancellor a normal phase of juristic development, and together do they furnish an adequate basis for a generalization upon the nature of the equity which they represent? If so, are we to conceive constructive equity as a permanent part or at least as an occasionally recurrent phase of the law, or only as a transitory mode of legal development characteristic of a particular stage of civilization, and tending like feudalism to occur once and but once in the history of a people?

Upon nearly all of these and many related questions, widely discrepant views are still entertained. The most obstinately mooted of them are those that concern the character and extent of equity's ethical superiority to the common law, and the limits within which she has been able to enforce her own standards adversely to those of the common law.

Many of those who have theorized upon this subject since the middle of the eighteenth century have maintained that equity's divergencies from the law are all referable to the greater efficiency of her procedure; to her modes of investigation, her enforcement of decrees by personal compulsion, and so forth, whereby she was enabled to make more far-reaching applications than the law could, of the ethical principles which the two systems had equally at heart; that if equity could recognize any right or duty not known to the law, it could be such only as escaped the law by reason merely of the inadequacy of its remedies or procedure; that equity has not had or claimed the power to mitigate the law's rigors or to depart from its standards of conduct; that it supplemented the law in respect only to its procedural inadequacies.

The earliest extant elaboration of this view seems to have been by Blackstone, who, in the twenty-seventh chapter of his third book, argues it so laboriously as to suggest that he regarded the chapter as having a substantial mission to perform. Its mission was twofold. It was designed to relieve English jurisprudence, at home and abroad, from the supposed discredit of administering justice with reference to the same transactions through two judicial systems proceeding upon conflicting conceptions of right.[1] It was also quite manifestly designed

[1] The argument of Blackstone was aimed particularly at the account of the equity jurisdiction which had been given by Lord Kames, in his "Principles of Equity," then recently published. 3 Hammond's Blackstone, p. 441, note. It is noticeable that no such exceptions to Lord Kames' work were taken by Lord Hardwicke in the letter concerning it which he addressed to the author. Parkes' Hist. of the Chancery, 501. While nearly all the things which Lord Kames supposed a court of equity might do were things which he found upon analysis actually had been done in emergencies by courts of equity in England, it is probably true that he failed to make

as a contribution toward the gradual closing up of the gap between law and equity, which at that time was probably regarded as a task that must fall upon the courts, rather than upon the legislature as finally to a great extent it did. It is not supposed, however, that Blackstone's theory was his or any one man's invention, although largely factitious, as his obviously strained arguments suggest.[2]

It was a legitimate and impersonal birth of time, and was in the air before Blackstone wrote.[3] During the three centuries, moreover, that had elapsed since equity

sufficient allowance for the essentially transitory character of equity's faculty of innovation, and also generalized too freely from some exceptional departures from the law.

[2] Among the vices of Blackstone's argument, the following are conspicuous. He adroitly slights the difference between the earlier equity that was a constructive system of grace, and the precedent-bound system of law that constituted the equity of his own day. He condescends to the *non sequitur* that because there were some legal rigors that equity had not assumed to mitigate, we should infer the absence of power to mitigate any. He slights the distinction between the attitude of early equity toward those positions which the common law had occupied from deliberate policy, and those into which it had been driven by supposition of logical necessity. From the fact that both systems interpret statutes by reference to the same rules, he would have us infer that they are generally alike insistent upon the supremacy of spirit and substance over form and letter. The common law's recognition of bailments, he puts into the scales as comparable to the equitable doctrines of use and trust, and he impugns the leadership which equity, even in ways unrelated to its procedural advantages, always maintained in developing the conceptions of accident and fraud.

[3] It was a natural culmination, as equity's capacity to introduce new principles died out, of the tendency always observable, as hereinafter noticed, to account for each equitable interposition as far as possible upon processual grounds, as a means of obviating or minimizing the appearance of incongruity between the moral standards of the two systems. See *infra*, chap. v.

had arisen as matter of sovereign conscience, grace, and discretion, it had inevitably hardened into a body of law, with all the rigidity normal to such a system. Its early prerogative of singling out for enforcement certain obligations and limitations of conscience had worn down into an administration of such principles only as had been settled and defined by its own precedents. In the meantime, the excessive rigidity of the old common law had greatly relaxed, partly through its own capacities for unaided development, partly through its assimilation of the law merchant, and partly through the ameliorating influences of equity. Its idolatry of form, precedent, untempered logic, and universality in its rules, its sense of its own all-sufficiency, were at least tottering to their fall; for the times had already given birth, not out of due season, to Bentham, who was learning, "by repulsion at Blackstone's feet," and to Mansfield, who by usurpation as was widely maintained, was able boldly to make upon the King's Bench as much utilitarian law as any of his precedent-bound contemporaries in the Chancery. The movements of each system had thus largely tended to reduce their points of contrast, though not quite to the extent that was supposed while Lord Mansfield was manipulating the common law by methods more progressive than it proved to be willing then permanently to adopt.

The filtration of principle from equity into the common law had occurred in a variety of ways. Conceptions of right which by the equity jurisprudence had been made familiar to the popular and professional mind, and proven practicable and wholesome, had a constant tendency to find their way by degrees into the common law even unavowedly and illicitly. They also acted as a powerful stimulus upon the common law to so refine and rationalize, and to so skillfully wield and develop its

own methods of juristic reasoning, that it might overtake equity at points equally accessible to both procedures.

And even where this impetus proved ineffective, and the law's reasoning lagged behind, judges now and again would more or less capriciously let in an equity not dependent upon Chancery's distinctive procedure upon the ground that to deny it could have as its only result to enforce a burdensome circuity of procedure.[4]

Sometimes a legal adoption of equitable doctrines was worked out through the summary jurisdiction over litigants which the common law courts were able to exercise through their peculiar control over their own procedure—as when they began striking out pleas which set up releases that equity would cancel as having been collusively given to one of several joint creditors. In Blackstone's age, venturesome judges were occasionally muttering, rather than consistently adjudging, that at points within the scope of the common law's procedural

[4] Notice for instance the reasoning of Willes, C. J., in *Scott* v. *Lurman*, Willes, 400, 401–2. The question was whether where goods had been consigned to and sold by a factor in his own name, and notes taken in his own name for the selling price, the property in the notes passed to the assignee in bankruptcy of the factor, or whether their proceeds could be recovered at law by the consignor. "We all agree," said Willes, C.J., "that the equity of the case is with the plaintiffs (the consignors), and that therefore if the law were against the plaintiffs, they would certainly be relieved in equity. . . . This point therefore cannot be disputed. And wherever the equity of the case is clearly with the plaintiff, I will always endeavor, if I can, and if it be anyways consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim in the law, that the law will always avoid circuity of action if possible, to prevent trouble and expense to the suitors; and for the same reason, I think *a fortiori* we ought to endeavor, if possible, to prevent suits in courts of equity. But to be sure no motive whatever is sufficient to warrant our determining contrary to law." The rule in equity was followed by the court. See also *Taylor* v. *Plumer*, 3 Maule & Selw. 562, 574–8.

equipment what is good equity ought to be considered good law.

Thus, at that time, by the hardening of equity, by the softening of the common law, and by the latter's long continued absorption of such principles of the former as were not derived from its peculiar procedure, conditions had arisen which brought within the range of plausibility the contention that the essential differences between the two systems were all explicable by their diversities of procedure. Of that it would be a corollary, that any conflict of doctrine unaccounted for by those diversities must be regarded as importing mere error the one court or the other, as in the ordinary case of conflicting decisions between courts of the same sovereignty purporting to administer the same law: a view of the matter which would greatly facilitate the abandonment of legal in favor of equitable positions, upon the theory that the latter were the truer applications of principles which both courts had been endeavoring to pursue.

However historically false such a theory might be, however studiously oblivious it might be to the distinction between past and present conditions — to the meagerness and rigor of the early common law, and to the prerogative, however imperfectly defined, of early equity to transmute matter of conscience into matter of law — its utilitarian possibilities as an agency for the reduction of the ugly gap between the two systems may well have seemed, from what we would now term a pragmatic point of view, sufficient to justify its acceptance as true, for the time being at least.

There seems to have been an unverified tradition that Blackstone merely reproduced a theory which had been developed by Lord Mansfield,[5] of whom it would

[5] 3 Hammond's Blackstone 604.

certainly have been characteristic. However this may have been, it is probable that Lord Mansfield, with all his genius for promoting legal development by arts of judicial construction, never contrived anything more happily adapted to that end. That it did not achieve the results of which it seemed capable was due to its failure to secure general judicial recognition. Though it has been countenanced by occasional dicta, the courts have rarely wavered in their adhesion to the traditional view that the ethical standards of the two systems differed in ways entirely unconnected with the processual limitations of the common law: that in the substantive law there were deficiencies which equity could supply, and rigors that she could mitigate.[6] In the text-books however, Blackstone's theory, which for convenience of reference may be termed the processual theory of the equity jurisdiction, has found abundant support, reverberating, as to some extent it does, through the notes of Fonblanque, the works of Wooddeson, Story, Wilson, Park, Willard, Dwight, Maitland, and others.[7] Of its more recent expositions the more notable are by Mr. Adams in his work on Equity, by Professor Maitland in his lectures, and by Professor Langdell in his work

[6] One of the most energetic of the few judicial avowals of the processual theory is by Lord Esher, M. R., at p. 21 of 32 Ch. Div., where he doubts "whether there are any principles of law which were differently affirmed in the old Court of Equity and the old courts of common law"; their differences being referable, as he thinks, to the fact that the two courts "dealt with the same matters for the purpose of different remedies, and therefore were necessarily looking at the same matters from different points of view."

[7] Story's Eq. Jur. § 11–20. See also his article on Equity in Encyc. Americana. Prof. Park in 10 Am. Jurist, 227. 2 Wilson's Works. 131 Dwight's Articles "Equity" and "Courts" in Johnson's Encyc. Maitland's Eq., 7, 12–4.

on the Pleadings, and in his fragment on the Jurisdiction, in Equity. So great has been Professor Langdell's prestige as a teacher of equity that it is not unlikely that this theory of the jurisdiction is now countenanced in a large proportion of our schools of law.

It is a suggestive tribute to the obscurities that beset the subject that so great a master of equity as the late Professor Pomeroy seems to have reached conclusions that stand toward the processual theory in the relation of an opposite extreme. He accredits early equity not only with a power, but with an unlimited power, to innovate in the interest of good conscience upon the substantive common law, and appears to consider that the failure of equity to subject the whole of the law to the revision of conscience is to be ascribed rather to the apathy of the Chancellors than to any early acknowledged limitations upon their powers.[8]

Midway between these two extremes lies the traditional judicial view already noticed, the accuracy of which it is believed will clearly appear in the course of our inquiry.

Although we have now passed largely from under the influence of the considerations of utility and of national and professional pride, already referred to as at one time incitements to the acceptance of the processual theory irrespective of its historical accuracy, and are better able than its originators were to view it in a duly critical spirit, it may seem a matter too inconsequential—too purely academic—to be profitably

[8] Pom. Eq. Jur. (2d ed.), secs. 48–54 and 427. In the last cited paragraph it is said: "Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law." So by Sir George Jessell, M.R., in *Baker* v. *Sebright*, L. R., 12 Ch. Div. 186, it is said that "almost all the doctrines of Equity were interferences with a legal right."

reopened at so late a day. Even from the standpoint of the practical lawyer this is a mistake. For adherents of the processual theory are impelled by it to assign, often very inconsiderately, a processual reason for every departure of equity from common law; and as the scope of a rule is determined by its reason, falsity in the assigned reason bodes more or less distortion in the rule. They are also driven, when a rule of equity variant from common law proves hopelessly intractable to such treatment, to reject it as an aberration from sound principle. In those and in other ways the theory thus becomes a prolific breeder of confusion in current expositions of equity.[9]

[9] Examples of this abound in the works of Professor Langdell. Thus, in his anxiety to trace to a processual origin the maxim that equity considers that done which ought to be done, he maintains that the maxim's only meaning is that equity extends retrospectively its decrees of specific performance, upon the principle of relation. He therefore challenges for "obstinate error" the apparently well-decided case of *Hughes* v. *Morris*, 2 DeG. M. & G. 349, which he concedes rests upon the ground that "the operation of a contract as a conveyance in equity was not the consequence of specific performance, but that the latter was a consequence of the former." Langdell's Brief Survey, 62–4. Of Professor Langdell's theory of the relations of equity to common law we have three versions. The first may be seen in his Equity Pleadings, mainly in the introduction and chapter vii, the second in Harv. L. Rev. 55, 111, afterwards published as articles i and ii of the Brief Survey; the third in 13 Harv. L. Rev. 537, 659, being articles ix and x of the Brief Survey. Critical comparison of these three versions leaves the impression that during the twenty years covered by these publications he became increasingly conscious of the refractoriness of his materials to detailed treatment along the lines of his original processual theory. The first paragraph of the last of these expositions, p. 219 of Brief Survey, was evidently intended as a warning that he had retraced some of his steps. The third version does not insist, as the first two reiteratedly did, that equity is strictly remedial, not substantive law. It contains the first distinct concession that "Equity

It involves an equally distinct loss to comparative jurisprudence. When justly conceived, the equity

interferes upon the ground that the substantive law, and not merely the remedial law, is inadequate to the purposes of justice." Brief Survey, 253. He still adheres, however, to the contention always involved in the processual theory, that equity never is or can be substantively inconsistent with or violative of the common law, p. 254. Upon this ground he insists that equity can never impose a general personal liability, p. 255, or anything that can be called equitable ownership, except by a figure of speech, p. 254. The possibility of equity's gradually developing personal into real obligations is ignored. Even the tendency of equity to develop true rights is denied, and equities are permanently remitted to the status of mere fictions, pp. 253–4. He denies that equity represents one of the State's methods of creating law, pp. 252–4. The doctrine of equitable waste he impales as a mere illicit departure by courts of equity from common law standards of contractual interpretation, or as a false attempt to create an equitable tort, pp. 251–2. The subrogation of simple contract creditors to specialty claims satisfied out of the personalty, he impeaches as simply a violation of law, pp. 189, 190. Indeed the general principle of subrogation is denounced for the same reason, p. 257. He would similarly eschew equitable relief from penalties and forfeitures, including the case of the mortgagor, but for the validity imparted by centuries of legislative acquiescence, p. 257. Postulating the consistency of equity with law, Eq. Pl. sec. 45, Brief Survey p. 254, he does not scruple to illegitimize all reputed equities not in his estimation conformable to that standard. By reference to his final delineation of equity's sphere it will be seen, indeed, that he pares it down practically to cases of use and trust and a few other instances of control over the use of legal rights. Brief Survey, 251–9. These he deems consistent with law, though he does not appear to explain how or why they can so be regarded. Insisting as he does that it is only upon principles of actual or constructive fraud that an equity becomes binding upon successors in interest of the party originally bound, he is led, logically enough, to challenge the settled rule by which the burden of proving innocent purchase is cast upon the person claiming to have purchased innocently. Eq. Pl., sec. 185. It is believed that in the course of our inquiry the untenability of these positions will appear.

The criticisms here ventured upon Professor Langdell's views

dispensed by Praetor and Chancellor vies in interest, in imposing proportions, in ethical significance, with other factors of the first magnitude in the world's institutional development. If the two dispensations are to be accepted as representative of one and the same general method of rationalizing the law as well in its substantive as in its remedial phases, and as having a common source in conditions that seem likely to arise at certain stages of intellectual progress, the light cast by each upon the other, and upon the principles common to both, will be found most serviceable, and will be rather increased than diminished by the manifold diversities of detail between the two systems. If, on the other hand, we denature the Chancellor's equity conformably to the processual theory of his jurisdiction, by deriving it wholly from the accident of his having fallen heir to a peculiar and alien procedure, not available to courts of common law, we strip it of all but local significance and conceal its instructive relationship to the Praetorian reforms. For it would be impossible to apply any such theory to the Praetor, who was custodian of all remedies, and dispenser of both law and grace.

are not made in any spirit of derogation from the splendid erudition in equity that so richly earned him the admiration of lawyers throughout the English-speaking world. If upon this particular but fundamental subject he taught an unsound doctrine, it would be a false and mischievous deference that would deter us from recognition of the fact. And from the eminence of Professor Langdell, and his prolonged advocacy of the processual theory, it is to him that we must turn for the most authentic presentations of it and its sequences.

CHAPTER II

THE PREROGATIVE OF GRACE IN ENGLAND AND IN ROME

Having thus noticed how variously problematical equity is, we must now note more closely that, as already implied, we are using the word *equity* in a restricted and somewhat technical sense. There is a popular meaning of the word, broad enough to include all juridical principles and methods that in a striking degree are ethically discriminating, fair, liberal, or humane. Such indeed has been the world meaning of the term, sanctioned by Greek, Roman, and both mediaeval and modern Continental usage, and even by our own lawyers until long after the rise of the Chancellor's extraordinary jurisdiction. It was in the case of the English Chancery, and then tardily, that the word was first specialized to denote exclusively the doctrines of a particular tribunal.

It would be therefore legitimate enough, and no doubt instructive, to classify as "equitable" and to study as an entirety or continuous series, all those doctrines and methods, of whatever tribunal, resulting from or contributing to exceptionally vigorous or searching applications of moral principle, as against tyrannies of form, letter, logic, technicality, or tradition, in the law. So conceived equity would be, in many of its manifestations, only a mode of interpreting the law, and to that extent would be, although in very different degrees at different times, an inevitable feature of the jurisprudence of every age and race. For at no time or place does the spirit

of the law fail to strive against its letter, or justice fail to achieve over the law's rigors triumphs memorable for their day.

But however feasible so discursive a study might be, it could not fail to bring to light the fact that the equity *par excellence*, of which the leading types are those built up by Praetor and Chancellor in wielding their sovereign prerogatives of grace or administrative discretion, is an equity of its own kind, so distinctive in origin, growth, and potentialities as to demand independent investigation. And this is the equity with which only our present inquiry is concerned. It is a peculiar and pre-eminent equity, because it is largely an outcome of the exercise of supreme powers peculiar to such a magistracy as that of the Praetor and the Keeper of the King's Conscience. To a great extent, equity is what it is because the Royal and Praetorian powers over the *operation* of the law were what they were: because while neither King nor Praetor had acknowledged power either to legislate, or to remold the accepted canons of judicial interpretation, each as sovereign administrator of the law was accredited with the right, by his interpositions as matter of grace, to enlarge or qualify the uses to which it could be put in particular instances, or for the time being for the avoidance of certain forms of legal injustice.

This supervisory power over the law's *workings*, this nondescript faculty of setting up against the law, or alongside of it, an administration of sovereign grace, which although rapidly taking on the character of a new kind or second growth of law was at first conceived as something essentially different from law, however alien it may be to a matured jurisprudence, however tantalizingly indeterminate it may have been, and however fruitful of unanswerable riddles, is unmistakably the

pivot upon which equity, in its history, theory, methods, and limitations, has turned. The singular elusiveness of equity in all these aspects is simply a reappearance in another form of the ambiguities that unavoidably infected this, its parent prerogative. Indeed, when completed, our entire inquiry will be seen to have resolved itself into little more than an appreciation of this prerogative, with respect to the conditions calling it into being — the rigor, the formalism, the substantive poverty and remedial inefficiency of early law, and the tardiness of legislation and judicial construction to develop into efficient agencies of law development — the congruity of such a prerogative with the modes of thought current during the period of its rise, the range of subjects over which, upon plausible grounds, its interpositions are capable of being extended, the theories that are resorted to in manipulating, amplifying, and vaguely defining it, and in reconciling its free exercise with its disclaimer of legislative power, and the processes by which the comparatively detached and tentative dispensations of grace indulged under cover of it are gradually systematized into a jurisprudence, and at last merged into the body of the law.

Although there were always sterling grounds for the affection lavished by our early English ancestors upon their common law, there perhaps was never a legal system illustrating more exuberantly than it did, about the time when equity was taking root, the variety of untoward conditions that may contribute to a chronic state of unfitness and inadequacy in early law. The remorseless ascendancy of the logical element over the ethical, the predominance of letter over spirit, of forms and ceremonies over considerations of substance and intent, which are among the inevitable traits of undeveloped law, were all oppressively exhibited by it,

though no doubt somewhat less extremely on account of the direct and indirect influences of the matured maxims and methods of Rome. Equally visible in it were the exaggerated veneration of early law for general rules, and its irrational antipathy to exceptions, its dwarfing fondness of the simple, and its aversion to the complex. From having been originally, like other primitive systems of law, a mere expedient to pacify society by averting the embroilments incident to self-help, it had progressed far enough to entertain, as its conscious end, the administration of justice between man and man with reference to some of the grosser forms of wrong. But by such forms and measures of relief only as might seem to be a fair substitute for the self-help which by its self-interest society had been driven to suppress. The law's activities were, however, still largely centered upon such wrongs as could be plausibly subsumed under the notion of forcible aggression, and even in redress of those it recognized in the injured individual no right of recourse to public authority for remedies more than fairly equivalent to the personal recaptions and reprisals which, for the general welfare, he had been forced to forgo. Beyond some such narrow limits, public authority was deemed the appropriate minister of public, not of private, ends. To many of the more delicate relations of life within the normal sphere of a matured jurisprudence, the law still deliberately turned a deaf ear and blind eye, upon the assumption that they were matters of morality rather than of law. For man to repose confidence in man, except in a few indispensable relations, it esteemed a mere folly, lying, when only private interests were involved, beyond the pale of legal redress. A like folly was imputed to him who in conveying, contracting, pleading, or in any legal act, failed to observe formalities, no matter how un-

substantial, that had been legally prescribed. The law was parsimonious, and would not give to those who by standards absurdly stringent could be supposed even to have had it in their power to avoid the injury complained of. Its aspirations and resources of self-development had not been yet aroused by any adequate ideal of an administration of justice approaching completeness in either its substantive or its remedial aspects.

It was, moreover, a law which, having been originally concerned with the relations of status incident to feudalism, had now to be made over to meet the exigencies of a commercial life thronged with contractual relationships.

Having for centuries dealt so exclusively with the primitive and feudal notion of possession that the idea of ownership apart from possession was practically unknown to it, the common law had now, in order to serve the activities and satisfy the concepts of a more advanced society, to be gradually worked over into a law of property.

Designed originally to govern purely domestic or internal relations and transactions, the rise of international commerce necessitated the infusion of a system of private international law.

For centuries also the common law had weltered along, destitute of any notion of the weighing of testimony, basing its judicial findings upon decisory oaths, ordeals, wagers of battle, and wagers of law. The notion was indeed of incredibly slow development, even after the introduction of the jury trial, which was at first an inquest into matters that might be deemed of more or less neighborhood notoriety, in which the inquisitors were supposed to proceed upon their personal knowledge or information, unaided, except occasionally, by documents and transaction witnesses. Although the jury

inquest was gradually extended to matters of less and less notoriety, and ultimately to the threshing out of all facts material to legal controversies no matter of how secret a nature they might be, the idea of a faculty in the jurors to pronounce, comparatively unaided, a trustworthy neighborhood judgment, was extremely persistent, and in combination with the early juror's low order of intelligence and the consequent distrust of his capacity to deal with complicated issues and dubious and conflicting testimony, exerted upon the unfoldment of the law of evidence a sadly repressive and distorting influence.

The law of evidence, thus dwarfed and misshapen in a surprising variety of ways, in its turn at numberless points stunted and crippled the substantive law, there being no two departments of the law between which the interactions are much more constant than between the rules of evidence and the substantive law. Could the common law have had a better conceived law of evidence and a tribunal more capable of administrating it, the development of its substantive conceptions would have been incalculably facilitated, as we shall have occasion to see.

Concerning the jury inquest, by which the other common law modes of trial were finally displaced, it is also to be noticed that by common consent, its peculiarities were such as to disqualify it from ever becoming a satisfactory method of investigating certain classes of issues, such as those involving many-sided controversies, accounts and similar complications of detail, the exercise of judicial discretion, and so forth.

Abundant as the materials are for the illustration of each of these shortcomings of the common law, we must content ourselves with such recourse to them as further on will be incident to our review of the urgencies

that from time to time provoked the Chancellor to equitable interposition. And these instances will probably be enough, in view of the notoriety of such deficiencies, and the frequency with which, in all these directions, we shall find the helping hand of equity extended. Similarly deferred and incidental illustration must also suffice for that truism in institutional history, the incompetency of legislation as then conceived and practised to deal with such an accumulation of adverse conditions.

For every intervention of equity speaks of inertness or inadequacy in the legislative organ not less plainly than of backwardness in the common law. No verification can be necessary of so recognized a fact as that for a long time legislation is resorted to only for the settlement of doubtful points, or for the sake of publicity, or occasionally to supplement the law, — rarely to alter or repeal it, and then only in response to some protracted class agitation. A body of early customary law is so confidingly accredited to a perfect wisdom either divine or ancestral that popular organs of legislation recoil almost religiously from its amendment. For its liberalization, therefore, society, as has been justly observed by Sir Henry Maine, is long principally dependent upon such fragmentary powers of innovation as cleave to the King.[1] According to Savigny, it was as late as Constantine before Roman legislation evinced a tendency to assume all the burdens of law development.

A comprehensive rationalization of law by refined methods of purely judicial construction is also an attainment reserved for a society's maturer stages. The golden age of the jurisconsults did not set in until about the reign of Hadrian, when in nearly all its other phases

[1] Early Law and Custom, 186.

the life of Rome had passed its zenith, and when Praetorian law, having spent its energy, was crystallizing in the edict of Julian, who is ranked as at once the last of the free-handed edict-framing Praetors and the first of the classical jurists. By a significant parallel in English history, the same year that witnessed the retirement of Lord Hardwicke, the last vigorous amplifier of the Chancellor's jurisdiction, brought Lord Mansfield into the King's Bench, where, as the first whose methods were comparable to those of the jurisconsults at their best, he was destined, without recourse to either legislation or the prerogative of grace, to open a new era of law development through the skillful employment of strictly judicial arts.

To the prerogative of grace, or of administrative discretion, the law of Rome was at least as much and as variously indebted as our own. Confessedly it was with that wand, mainly, that the Praetor gradually exorcised the primitive materialism of the law, relieving against transactions ceremonially perfect, upon grounds of fraud, duress, and mistake, protecting *bonae fidei* possessions acquired without mancipation, enforcing formless real and consensual contracts, and non-mancipative and unilateral wills, working generally toward the substitution of intention and substance for form as the essence of legal acts, and subordinating logical necessity to moral necessity at many of their competitive points. To this extent Praetor and Chancellor, dealing with imperfections common to all systems of undeveloped law, proceeded along lines approximately parallel, though with marked variations of method and detail.

But each had also fields of activity peculiar to himself.[2]

[2] Notable among those of the Chancellor already suggested was his *magnum opus*, uses and trusts, — a subject with which, in our

Chief among these, in the case of the Praetor, was that upon which he entered in assuming to "*give*" actions to and against others than Roman citizens. For in so doing he initiated an administration of justice between classes of persons whose interrelations lay confessedly beyond the pale of that body of rules, strictly personal to members of the Roman tribes, which made up the only law that the early Romans knew, and into which on its civil side at least the notion of territorial sovereignty did not enter.

Modern interest in this memorable undertaking has centered largely in mooted questions as to the theories relied upon by the Praetors to justify, guide, and limit their interventions in such cases. How far did they proceed upon the assumption that here, as often elsewhere, they were merely utilizing their control over remedies to enforce moral obligations which had been prevented from becoming legal only by conditions savoring of the accidental, or by irrational limitations imposed upon customary law by its peculiar modes of development? How far upon the strength of customs or tacit understandings seen to be current in peregrin transactions? How far by progressive recognitions of territorial sovereignty, through recourse to the fiction of citizenship or

equitable sense, the Praetor never assumed to deal. Even the *fideicommissum* received its earliest legal sanction at the hands of the Emperor. The diversity between the concrete subjects largely dealt with by Praetor and Chancellor respectively seemed to Austin to denote an absence of close kinship between the two, and to foreclose generalizations to be based upon the two systems. But unjustly: as it is the first law of a prerogative of grace that the specific subjects upon which it will spend its energies must depend wholly upon the particular social and legal conditions by which it is confronted; upon the directions in which under local and current conditions it happens that the stimulus of moral necessity is greatest, or the resistance of tradition least.

otherwise, at first in the law of crimes, then in the law of delicts, then even in those kernels of substance that remained of conveyance and contract after stripping off the distinctively Roman husks of form and technicality? As these discretionary interpositions hardened into a body of peregrin law which must be vindicated, systematized, and amplified by philosophic generalizations, how far did the Praetors proceed inductively by identifying elements of law common to all nations, and how far deductively upon the later Greek theories of natural law?

Doubtless every one of these methods may safely be accredited with generous contributions to peregrin law at some stage of its development, their relative importance varying from time to time. The most noteworthy fact in this connection is that along whichever of these lines the Praetors pursued their quest of principles for the government of peregrin relations, their backs were almost constantly turned upon the historical, formal, and technical elements of every known system of positive law. With the stubborn resistance everywhere else interposed by those elements to the judicial liberalization of law, they here did not have to contend. Never elsewhere has it fallen to the lot of a magistrate to give so free and broadly constructive play to his own conceptions of right. These momentous assumptions of the Praetor that the legal remedies entrusted somewhat irresponsibly to his keeping and distribution, although originally applicable to the mutual relations of citizens only, could for the time being and as a matter of sovereign favor be employed to some extent by him against, and in favor of, the non-citizen classes, and that the relations of the latter, upon whatever theory regarded, should be deemed unconstrained by the formalism, technicalities, and rigors inherited by any particular system of tribal or personal law, were among the most beneficently fruitful in the

law's history. The body of unprecedentedly rational rules of which they were productive redoubled their significance by their reactions upon citizens' law. For the tendency of advanced and liberal rules thus introduced into the peregrin edict to pass over into the urban edict was so pronounced as to result ultimately in the merger of the two. Though not so widely recognized, it seems equally certain that this sustained and comprehensive exercise of the innovating prerogative, in response to a necessity so obvious and imperious as that which dictated the extension, upon some principle, of legal remedies to the ever-rising stream of peregrin transactions, could not have failed to magnify current popular and legal conceptions of the general breadth of the Praetorian discretion, and so to have contributed to its energy and efficiency as an agent for the direct reformation of citizens' law.

Another subject of equitable reforms never deemed accessible to our Chancellor, yet a favorite with the Praetor, and with him second in importance only to that just considered, was the law of intestate succession, which he gradually broadened and softened almost to a point of complete transformation. Espousing the natural claims of blood relationship, of which, beyond the circle of agnates, the old law had taken no account, he from time to time, in the event of the absence of agnatic heirs, extended practically the benefits of succession first to one and then to another class of non-agnatic kindred whose claims appealed to his favor with especial force, until he had reared something like a complete system of cognatic succession, to be administered in subordination to the agnatic principle of the old law, and as a supplement to it, wherein a capacity for the fruits of succession in the absence of agnates was recognized even in women and those claiming

through them. In all this, he no doubt justified himself through the assumption that the law might fairly be deemed silent respecting such cognatic relations when there were no agnates to compete with them, and when such historic grounds for a policy of exclusion as might once have existed had long since faded away.

Again, while the old law conceived its rules of inheritance to rest upon other bases than mere blood relationship as such, and to be interpretable by reference to technicalities more regardful of the limitations of the paternal power than of the ties of blood, it is certain that the Praetor, although recognizing the law's agnatic limitations as generally binding upon him, was more appreciative than the old law was that though recognized only in mutilated form, blood relationship lay at the heart, and was the substance even, of the agnatic system. So that when the law, through excess of logical rigor, would ignore the claims of a cognate whose normal place was within the agnatic circle, but who, by circumstances more or less fortuitous, had fallen out of it, the Praetor would presume to take such advantage of his control over remedies as to afford relief. It was thus that he succored sons whose agnatic relation had been forfeited by emancipation from the power of the father, persons who had suffered similar forfeiture by degradation of status, wives who had been married without *manus*, and others left, by a species of accident, beyond the agnatic pale, such as "the children whose freedom from the power of their parents only resulted from their receiving jointly with their father a donation of Roman citizenship, without a fiat of the Emperor subjecting them to the parental power."

Again, the old law of inheritance bore many marks of having been molded more largely by the exigencies of family religion than by a concern for individual

rights, and by unseasonable affinities to a primitive family ownership and solidarity which had long since been overgrown by the individuality and ownership of the family's head. The old law exhibited no anxiety to subject its historical and logical elements to the revisions of the moral sense. In the matter of inheritance, it was content that its universal succession to estate and liabilities should fall absolutely, whether the estate were solvent or insolvent, upon the nearest agnate or order of agnates, willing or unwilling, and without precautions for insuring to creditors of either heir or ancestor priority in the particular estate to which respectively they had given credit, and without any provision for opening the succession to other individuals, although the appointed agnate should ignore it or die before entrance upon it. Here again, besides supplying for cognates the "order of succession" thus wanting in the agnatic system, the Praetor at intervals made bold to exploit, as a buffer against certain forms of injustice, the power that he possessed over remedies, by granting, during the term of his administration, to parties oppressed by these rigors certain boons or indulgences (*"beneficia"*). Against an heir who seasonably declared his intention to abstain from the inheritance, he refused remedies to ancestral creditors. Conversely, as a favor to ancestral creditors who seasonably sought a separation of the two estates, he refused to existing personal creditors of the heir remedies which would enable them to compete with ancestral creditors for the ancestral estate.

These two *beneficia* of the Praetor are thoroughly representative of one interesting type of equitable reform. A rule of law has the unhappy tendency to outlive the conditions that gave it birth, even when it is only by reference to such conditions that it could ever have

been either justified or explained. It may have dwindled into the merest survival, yet its superannuated letter may continue to exert the force of law. It is only in a few clean-cut cases that the courts will venture, as matter of strictly judicial construction, to sweep away a rule upon the ground that it has ceased with the ceasing of its reason. Often the change of conditions has been too gradual and imperceptible — too stealthy as we might say — to awaken that principle. Often the change is logically so far-reaching, so infinite in its ramifications of sequences, that undue confusion would result from an attempt to invalidate all the old rules whose rational foundations should be deemed undermined. The general body of the law may even have passed confessedly under the spell of a new and utterly different basic spirit or policy, yet courts and legislatures alike may shrink in conscious incapacity from any comprehensive attempt to readjust the law's mass of moribund specific rules to its now living spirit. The survival of many old rules and formulas is then due simply to the incapacity of the law to achieve complete ascendancy for its deeper living voices of new principle. A higher criticism — an interpretation somewhat bolder than that in vogue — might well have treated such rules as having terminated with the acknowledged disappearance of the conditions or policies with reference to which they had been framed. In the absence of such treatment, they stand as more as less distorted expressions, into which, by historical processes, the law has been entrapped, and therefore as fit subjects for an exercise of the prerogative of grace, whenever they become oppressive enough to arouse it into action.

Such were the circumstances that gave rise to the two Praetorian boons in question. The rigorous rules from which they were designed to afford relief had been in-

herited from remote ages when the solidarity and immortality of the family, and the maintenance of family rites, were the master aspirations of the law; when many regulations originating in the old family ownership still unseasonably persisted, and when considerations of individual right were of distinctly secondary importance.

With all these conditions reversed, with secular interests predominating over the religious, with family interests and ownership overgrown by those of the individual, with justice between individuals as the chief end of the law, it was inevitable that the prerogative of grace should venture to countenance some humane distinctions, which, although they had never found utterance in the old law, were unmistakably within the spirit of the new.

CHAPTER III

THE NON-LEGISLATIVE CHARACTER AND THE EVOLUTIONAL VALUE AND METHODS OF THE PREROGATIVE OF GRACE

To what extent, if at all, the innovations of Praetor or Chancellor are to be ranked as legislation, is a question of classification upon which we must continue to anticipate conflicting views. It approaches too closely mere verbal disputation, and opinions concerning it are too irreconcilable to warrant its full discussion here. There are, however, a few considerations lying so closely at hand as to invite mention. With respect to the Praetor, there is, indeed, among moderns, a very general disposition to regard many of his reforms as essentially legislative in character. It is equally clear that a contrary understanding was prevalent in Rome during the period of Praetorian energy. Although there was no lack of appreciation that the Praetor was directly or indirectly modifying the law, it is safe to say that the assumption then was that he was doing so in the exercise of powers and methods strictly befitting a supreme magistrate whose functions were administrative only.

The tendency to class as usurpatory legislation many non-legislative changes incident to the law's growth is as modern as it is utterly indefensible. The people through their formation of customs, the judges through their processes of interpretation, both judges and juries through the tendency of even some of their findings of fact to crystallize into principles of law, and the sovereign magistrate through the prerogative of grace incident to

his administrative supervision and control over remedies, although all acting in acknowledged subordination to the legislative will, are, within their several limited spheres, and in the absence of conflict with that will, as distinctly and legitimately law-producing agencies as the legislature itself. If we are to apply the word legislation to all forms of law-alteration, we must either invent a new word for the specific mode of innovation for which popularly and legally that word has immemorially stood, or, by confounding things essentially distinct, invite a pernicious train of confused ideas.

The two subjects upon which, perhaps, the Praetorian reforms have been generally regarded as most undeniably legislative, are those to which we have just referred in another connection, the law for peregrins, and that relating to intestate successions. It is not strange that the unfolding by the Praetor of an entire system of law applicable between classes of persons otherwise destitute of legal interrelations, particularly when accomplished through the agency of an edict, has seemed to many like a clear case of legislation upon a really magnificent scale. But may we not well hesitate to class as a product of legislation, a kind of law everywhere brought to light by an executive and judicial magistracy, and nowhere in the world's history enacted, primarily, by a body or organ openly and avowedly legislative? That our modern private international law, consisting of principles for co-ordinating our conflicting systems of territorial law at points where they compete for the control of international private relations, has been unfolded by judicial construction no one will deny. That in the shaping of the law merchant custom was the dominant agency, goes without saying. No less clear is the customary origin of the various bodies of sea law. With antiquity's task of finding law for the interrelations of the members of

different tribes, cities, or States, whose domestic laws were strictly personal to their own members, no other people dealt as comprehensively as the Romans. So far as others went, however, it is believed that without exception their recourse, like that of the Romans, was to methods which they deemed within the range of the judicial and administrative powers, and that organs confessedly legislative have not anywhere, upon any considerable scale, been called into requisition.

With reference to the Praetorian reforms of the law of succession, exaggerated impressions have resulted from the assumption sometimes made, that the tie upon which the old law of succession rested was the paternal power, and not the tie of blood relationship whose claims it was the Praetor's aim to enforce: a view which supposes the Praetor to have introduced an entirely new principle of succession. But the Praetor manifestly and correctly assumed, on the contrary, that blood relationship was the basic principle even of the old law, whose exclusion of cognates even in the absence of agnates, and many of whose other peculiarities, were due to the fact that in the original exploitation of the principle of blood relationship it was pursued with too exclusive reference to certain ulterior ends of family solidarity and family worship, and with too little regard for individual interests and claims. As those ulterior ends gradually faded out of the popular consciousness, and questions of individual right loomed in the foreground, many of the old rules were irrationalized and left so archaic and invidious as fairly to be relieved against by way of administrative indulgence.

This administrative discretion being, as largely it is, in the nature of a counteractive to archaically parsimonious or rigorous legal methods, a makeshift to meet the exigencies of society during the immaturity of its

faculties of rational interpretation and legislation, its tendency is to decrease as those faculties increase. In a system of law as mature as our own, it has so dwindled that we are prone to forget how large it bulked in its golden ages, and to explain it away as only a crude and veiled form of interpretation in some cases, and of legislation in others. But no good purposes can be served by any analysis of the law and its methods which is so pervertingly oblivious of historical conditions and processes as to deny the substantive character, as a law-producing agency, of a prerogative so august, and in its methods, aptitudes, and limitations so variously distinctive, as that which, with numberless memorable effects upon the legal history of the world, was wielded by Praetor and Chancellor.

It is, of course, true that after equity has become precedent-bound, and restricted in its innovations to new applications of its already established principles, the functions of the administrator become merely interpretative or judicial. Even in its earlier and more constructive period, to which, mainly, special interest and significance attach, a very large percentage of its doctrines are such, no doubt, as could have been arrived at by interpreting existing law in a manner more searchingly humane than was then deemed permissible. The fact remains, as we shall have occasion to note, that it was not to any theory of a more refined construction of extant law that early equity had recourse.

So, although her ministrations resulted in the growth alongside the law of many modifying principles which perhaps transcended the reformatory limits of interpretation even at its best, these were resultants of devious processes widely variant from those of legislation.

It is the attitude of a well-matured system of law that, by its minute co-ordinations of the logica land the

ethical, its studious mediations between form and substance, letter and spirit, rule and exceptions, its temperings of rigor with mercy, its insistence upon the finer obligations of trust and confidence, its sensibility to fraud, accident, and mistake, its coupling of preventive with redressive remedies, its elaborated devices for eliciting the truth, enforcing obligations, and averting — through changes of venue, new trials, and appeals—judicial abuse or miscarriage in particular instances, the entire field of distributive justice has been so covered as to leave little or no place or occasion for administrative discretion. But this completeness comes only as the belated product of ages of collaboration between all the law-producing agencies.

On the contrary, the administrator of early law is everywhere confronted with evidence of its substantive and remedial inadequacy, in its then characteristic meagerness and rigor, to deal justly with so complicated and delicate a subject as the relations of human life. Custom, the principal source of early law, has as a distinctive vice that its tendency is to take cognizance only of conditions and situations of common occurrence. From its very nature, the exceptional is likely to elude it. Judicial construction, the second principal source of early law, has at the time, as a characteristic vice, a merciless ascendancy of logical over ethical considerations. By such vices as these, by addiction to form at the expense of substance, to letter neglectfully of intent or spirit, by its quiescent attitude toward many forms of injustice owing to its too contracted estimate of its own proper sphere and its lack of high ideals of legal completeness and of precision in judicial results, early law is visibly incapacitated from serving, even approximately, the ends of justice. The vast, highly composite, and finely articulated system of well-modulated principles and exceptions

that go to make up a matured jurisprudence lies, even as an ideal, beyond its ken.

The evolutional value of a restricted system of sovereign grace or discretion as a supplement to a law thus multifariously deficient, both in methods and in concrete doctrines, could hardly be attested more persuasively than it is by the simple fact that the two great law-producing races have, upon so magnificent a scale, concurred in its use. That unprogressive races, or those of no legal achievements, have not resorted to it, has no meaning. Nor does a contrary significance attach to the fact that recourse to such a system has not been found necessary by the other nations of Continental Europe. Their ability to dispense with it, is fairly accounted for by the extent to which they inherited the perfected law of Rome, in which not only all the indulgences of the Praetor, but the ripest interpretative methods of the jurists, were stored up.

That the system is admirably adapted to surmount or evade some of the obstacles to the reform of early law admits of no doubt. As, in its first stages, it does not purport to modify the law, it to some extent, during its formative and critical period, eludes the excess of misgiving with which encroachments upon legal principle are in such an age popularly and professionally regarded. In its early theory, it professes to leave the intercepted rule of law intact, somewhat as in the case of a pardon, relief being extended as a detached act of magisterial clemency in the particular instance. By the time it becomes evident that a new modifying system of law is evolving, the force of law has actually attached to the principles habitually acted upon by the magistrate, whose authority is then too well established to be impugned. During the formative period the interpositions of the Praetor or Chancellor, although tending to gradually

take on uniformity through arrangement along lines of principle, have the advantage of being tentative, flexible, unfettered by precedent, easily variable in the light of experience.

Another equally auspicious quality of the prerogative of grace is that it is employable only in furtherance of justice. It is an agency for promoting the conciliation of law with justice — a discretion to mitigate, under some urgent circumstances, but never to aggravate, the law's formalism and rigor; and speaking roundly, to supplement some of the law's inadequate remedies, when presumptively a more efficient remedy would import a more perfect justice.[1]

Thus it was only when the administrative authority inherent in Praetor or Chancellor, and the moral authority inherent in a precept of natural justice, combined and

[1] The Court of Star Chamber, which, after falling into ill-repute from abuse of its powers, was abolished by Statute 16 Car. 1, c. 10, sprang from the inevitable exigencies of administrative supervision and discretion just as the Court of Chancery did. It was mainly concerned, however, with exceptional crimes, torts, breaches of public order, and offenses against the administration of justice, and so was often ranked as a Court of Criminal Equity. Considering the contrast in the fate of the two courts — the one being of noble, the other of ignoble, memory — it is a matter of no little interest to observe to how great an extent the arguments in vindication of the two jurisdictions ran along parallel lines, as may be seen in the sketch of the two courts in Lambard's Archion, pp. 55–217. That the one court reaped fame and the other infamy can safely be ascribed to two circumstances. In the Star Chamber the temptation to abuse was greater, because the subjects there dealt with touched more directly the prerogative and selfish interests of the King, and its criminal sentences could easily degenerate into an enginery of oppression. The opportunities of abuse were greater also, as the Star Chamber was unfettered by the *equitable* limitation. The discretion of the Star Chamber was to enhance the law's efficiency, while, as already noticed, it was confessedly almost the sole function of the Chancellor's Court to increase its equitableness.

reinforced each other, that relief could be afforded even as matter of grace; and it was then only through repetitions of the boon under like conditions that, by way of judicial custom, its principle could ripen into a kind of law.[2]

In the system's favor, it must therefore be noticed that by thus bringing into collaboration these three law-producing forces it was able to accomplish reforms to which the tardily maturing arts of legislation and judicial construction had proven themselves then unequal or indifferent. It was in the nature of a triple alliance between the principles of sovereign administrative authority, natural right, and custom, for the purpose of adding to certain classes of moral obligations and

[2] In his celebrated generalization upon the agencies of legal progress, Sir Henry Maine represents the equity of Praetor and Chancellor as a "body of rules existing by the side of the original civil law, founded on distinct principles and claiming to supersede the civil law, in virtue of a superior sanctity inherent in those principles." He conceives that "its claim to authority is grounded not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles," and that those principles "pretend to a paramount sacredness entitling them at once to the recognition of the courts, even without the concurrence of prince or parliamentary assembly." Ancient Law, 27. These words imply a sharply defined theory of a self-sufficing natural law, such as never took root in either Rome or England. It is hard to say what phase of the history of either people could have suggested such a conception of equity, in view of the constant prominence of magisterial authority as a factor in it in both countries. So extremely prominent was it, indeed, that it is the only factor which, upon surveying the same equity, Professor Langdell was able to see. Equity, as it appeared to him, was neither nature's law nor the State's, but a creature of the sheer physical force which was at the command of Praetor or King. Brief Survey, pp. 252–3. It is plain that each of these distinguished analysts of Equity was able to discover in it an important element that was either overlooked or improvidently dismissed as negligible by the other.

distinctions the force of positive law, by a circuitous method which had the advantage of belating or veiling the legal quality of its innovations until the community had become inured to them as habitual matters of grace.

It is a further peculiar and most fruitful advantage of the system, that by sheer force of its discretionary quality, its administrator is enabled to impose upon suitors for equitable relief whatever ethical conditions good conscience may seem to require, even to the point of exacting a waiver of legal rights. What these conditions shall be in given situations gradually becomes settled as matter of precedent, so that the discretionary element is an ever-dwindling quantity. Yet even at this late day, there are residuary unstereotyped principles of morality still capable of enforcement through original applications of such maxims as that he who would have equity must do equity, and must come with clean hands, and through the remnants of discretion still exercisable concerning such extraordinary remedies as specific performance, cancellation, and injunction.

The fitness of such a system, in such an age, to bring forth wholesome law is too palpable, and has been too well tried out in the crucible of experience, to permit of doubt. Yet the annoying, and from modern viewpoints, the irrational duality which it breeds in the law, is so alien to our modern modes of thought that most of us are prone to regard it as a folly of man rather than one of nature's normal developments. We must put this down as a mistake. It is indeed probable that society would have worked out ultimately, through legislation and judicial construction, and without developing a troublesome duality in the law, the same results that were brought about through the prerogative of

grace. But each age is fettered by its own temperament and mental limitations, and must resort to those methods of progression most congenial to it, and for which it has the greatest aptitudes. In tasks as difficult as the amelioration of early law, it must proceed along lines of least resistance, its concern being not which method will least embarrass ages to come, but which is most immediately available.

A matured jurisprudence consists of one homogeneous mass of rules, in which considerations of logic and morality, of strict law and mercy, have been completely transfused into a body of tempered and modulated doctrines. Hence, if the law is seen to operate oppressively in a particular case or class of cases, either by its inclusions or by its exclusions, we consider that it should be amended, unless the hardship is one necessary to be borne by the individual for the general good. But to a great extent in early society the fountains of mercy are not in the law, but outside of it, and generally the thought then suggested by the hard case is not amendment of the law but relief through an exercise of administrative grace. Law is then conceived as in its very nature too general, too rigorously logical and inflexible to be bent to all the exigencies of distributive justice. Recourse to some more elastic supplementary system seems and in fact is a necessity. A matured and tempered body of law is in the nature of an ultimate composite of these two antecedent systems.

As already noticed, administrative grace is in demand in proportion to the fallibility of the law, waxing when the law is weak, fragmentary, and unarticulated, waning as it grows complete, articulate, modulated, and strong. Of this principle and its automatic workings two highly suggestive examples occur in the history of the prerogative of grace as exercised in criminal cases by way of

pardon; between which and the exercise of grace in civil causes there are many instructive analogies.[3]

It is a familiar fact that for centuries a distinction so fundamental in morals as that between willful murder and excusable or justifiable homicide failed to find lodgment in our law. The only refuge of the accidental or self-defensive slayer was in the clemency of the King. The pardon in the course of ages became so much a matter of course that, to avoid circuity, juries were finally permitted to acquit upon such grounds.

The law which, upon its criminal side, was content to compel an accused person to seek in royal clemency the benefit of such a distinction as this, could hardly fail to give, on its civil side, manifold occasion for seeking refuge in sovereign grace. Taking a more modern instance, under an ever-increasing fondness for sanguinary criminal laws, and what seemed like an obliviousness to the distinction between trivial and atrocious offenses, the catalogue of death penalties ran up from the eleven of Bracton's time to the one hundred and sixty counted by Blackstone. The accused was also long afflicted with numerous procedural infirmities in the law, such as its denial of his right to counsel, its refusal to swear his witnesses, and the absence of provision for new trials — all conducive to fallibility in the legal result. As might have been foreseen, the effect of these inhumane conditions was to swell into a flood the streams of royal mercy. In 1805, as we are told by Mr. Pike, four out of every five sentences of death were commuted. In

[3] How striking the analogies are, is nowhere better illustrated than in the work of Mr. William W. Smithers, on Executive Clemency, which, in a sense unconsciously, brings to light the impossibility of characterizing either function except in terms which immemorially have been used to describe the other. See pages 23, 27, 48, 51, 60, 100–104.

the King's effort to enforce distinctions in culpability which the law had ignored, the proportion of commutations continued to rise until in 1831 it was twenty-nine out of every thirty.[4] Then set in the legislative reforms of which this tide of clemency had been the forerunner.

We must not forget, in this connection, that in this age of bloody laws, public sentiment was not as cruel as it looks upon the face of these statutes. The monotone of death that ran through the penal statutes was due not wholly to a desire to terrify evildoers, or to blindness to the varying shades of guilt, but in part to a feeling that discrimination between them was a function of grace more properly than of law.

On its civil side, the prerogative of grace so long ago crystallized into hard and fast rules that we find it difficult to appreciate the constructive energy that it once displayed. Not having exhibited on its criminal side the same tendency to resolve itself into fixed rules, it is on that side still seen everywhere in action, though the occasions for recourse to it dwindle as the law matures. Such incidents as the foregoing are of value as illustrating how inevitably the civil side of the prerogative, though subject, of course, to its own appropriate limitations, must have become, during the period of its virility, a catch-all and cure-all for many sorts of deficiencies in the common law. They warn us not to presuppose that in an age anterior to the transfusion of strict law and mercy or grace, there was anything absurd or abnormal in conceiving the two as standing in the relation of independent and to some extent opposing systems, whose interplay and reciprocal counteractions were necessary to the working out of results refinedly just. Apparently a principal reason why a prerogative of grace in matters

[4] 2 Pike's Hist. of Crime, 453.

civil now seems abnormal, while the analogous prerogative in criminal cases still persists, is that for reasons which it is not worth while here to trace, the former, more fully than the latter, has succeeded in reducing its perceptions of right to general principles, and in infusing them into the body of the law. Until its mission has been thus discharged, it seems to be, though with its own peculiar limitations, as normal a factor in the administration of justice as its longer-lived criminal analogue.

CHAPTER IV

THE LAW'S DUALISM IN ROME AND IN ENGLAND

The Praetor having been at once final interpreter of the law and dispenser of grace, the two functions were never as sharply contrasted with the Romans as with us: a natural consequence of their failure, as hereinafter noted, to discriminate closely between executive and judicial power. Administering law and grace in the same proceeding, if there was occasion so to do, and defining his general positions with respect to each in the same edict, there was generally nothing in the form of his pronouncements to disclose how far he supposed himself to be exercising the one function or the other in reaching a given result. In whichever capacity he spoke, he gave or withheld the action or defense, or defined the conditions under which judgment should be rendered for or against a given party, in the same laconic and dogmatic terms, without deigning to assign his grounds. The Romans seem, indeed, never to have found a motive for discriminating systematically between the two functions, or between their products. For their purposes it appears to have been enough that a given result was justifiable by reference to either. To which of the two it was appropriately referable never became with them a practical question, as generally no practical consequences attended its solution. None of the lines of Roman law that would seem to us most likely to run parallel to the distinction between the two functions, appears to do so; neither that between *jus civile* and

Praetorian law, nor that between the Praetor's *imperium* and his *jurisdictio*, nor that between his ordinary and extraordinary jurisdiction, nor generally those between the different classes of actions.

Yet there was no lack of consciousness that the Praetor was transcending the limits of interpretation, and was systematically engaged in the distribution of "boons." Indeed this was the function, if either, that flourished at the expense of the other, on account of the imperfect observance of the differences between the two. It was interpretation that was overshadowed and retarded. The early Praetors were generally laymen, unskilled in the arts of interpretation, which indeed were then hardly existent. It was easier for them in exceptional cases to act, as matter of discretion, upon direct personal or popular concrete perceptions of right, than to undertake the expansion or abrasion of the law by laboriously refined or ingenious constructions, even when such constructions might have been possible. The Praetor's theory of his boons seems to have been of the simplest kind. As the comparatively irresponsible custodian and dispenser of the law's remedies, he had it in his *power* to give or refuse them even upon extra-legal grounds. This power, agreeably to very widely diffused notions of a sovereign administrator's prerogatives, he insisted upon employing, not avowedly by way of law amendment, or to the extent of antagonizing the law's deliberate policies, but in transitory reparation of the law's inertness or indifference to the justice of extraordinary situations, or as a temporary buffer or counteractant against the more or less fortuitous, or so to speak involuntary, vices of excess or deficiency, by which he found the law everywhere ensnared. When the moral urgency was great, he would because he could, and because he was not outrunning the liberal conceptions

of the sphere of administrative supervision characteristically current in his day.

Disclaiming as he did any authority to alter the substantive law, his manipulation of remedies must be such as nominally, at least, to leave that law intact. He could not, for instance, grant or withhold a remedy upon the theory that an ownership, an heirship, or a marriage existed, where none existed by the *jus civile*. He could, however, under equitable pressure, as where the substance of the relation existed without the form, so manipulate his remedies as to protect a party in the enjoyment of more or less of the same privileges as though he were actually owner, heir, or married, although not so in strictness of law. By necessary laws of thought, relief of that kind, habitually administered, resulted in the growth of a new or Praetorian ownership, heirship, marriage, and so on practically through the whole catalogue of institutions, until throughout Roman law was seamed and sundered by dualisms of this character. Deformities they undoubtedly were, and a prolific source of obscurity and inconvenience. Yet these detriments were a bagatelle when compared with the benefits accruing to Rome and the world from the many wholesome principles which, having failed to find utterance through custom, legislation, or interpretation, were, by the Praetor's circumlocutory methods, thus smuggled into the law in the propitiatory guise of a temporary boon.

But is it supposable that the Praetor might have avoided the obnoxious dualisms by rejecting the fictitious assumptions that he was taking liberties with remedies only, and was indulging only in detached acts of grace, and by engrafting his principles avowedly upon the substantive law? It was those fictions alone, if they may be so called, that placated the stolid con-

servatism of the race and age, by minimizing and partially veiling the fact of change. The Praetor, like Archimedes, must have a lever if he would move the world, and these fictions were the only levers at his command. There was no vestige of tradition or theory warranting his direct modification of substantive law.

Nor, it must be observed, were these so-called fictions as fictitious as they now look. When the Praetor began the distribution of his boons, they were in very truth detached favors, comparable, as already noted, to nothing so much as to a pardon. Their gradual transformation into a body of law was the slow, evolutionary work of later centuries. So, the distinctness with which substantive law stands out in opposition to procedure, and the current conception of their relative spheres, vary very widely at different stages of legal development; procedure and the power incident to its control bulking enormously in the primitive eye. Nor must it be forgotten that even to our day, it is the familiar practice of our courts to bring about changes in the workings of substantive law, confessedly beyond their power of direct amendment, by exploiting their peculiar control over matters of practice, pleading, evidence, burden of proof, and presumptions.

Recurring to the circumstance already mentioned, of the rarity in Roman law of lines running parallel to that between law and grace, the reason for it is to be found in the fact that under the Roman system, interpretations of the old law did not, in the main, cleave to and become a part of that law, as logically from our point of view they should have done, but speaking generally, fused instead with the principles entering into the Praetor's boons, combining with them to make up the mass of new law sometimes termed Praetorian. Several reasons occur as accounting for this, to us, erratic course of events.

In the first place the distinction between interpretation and the exercise of grace or discretion manifests itself very imperfectly to the early intelligence. Almost the entire field afterward occupied by both is originally covered by grace alone. As long as the law's standards are strictly those of form rather than of substance, and transactions are deemed gaugeable rather by the ceremonious act and the spoken word than by the intention, every considerable abatement from the former in deference to the latter must be conceived as referable to considerations extra-legal in character, indulged as matters of sovereign grace. It is only after the sublimation of ideas has proceeded so far that the law itself is seen to have criteria of right higher than its primitive externalities that the door is open for interpretation to become much more than a negligible quantity; since it is in the pursuit and application of those higher criteria that interpretation mainly consists. Practically all the Praetorian ameliorations tending thus naturally to flow in a single stream at their inception, their continuance to do so despite their later partial differentiation can hardly be regarded as matter of surprise.

Another circumstance favoring the confusion of the Praetor's interpretative ameliorations with his boons, was the comparative absence from Roman law of the principle *stare decisis*. Had that principle governed his interpretative decisions the necessity for distinguishing between them and his boons would at once have arisen. But the principle has never flourished in either Roman law or any of its derivative systems.

In Rome, the only slight approaches toward it during the republican period were the statutes which, about three centuries after the institution of the Praetorship, required, in the interest of uniformity, that each incumbent upon his accession to the office should announce by

edict (hitherto optional with the Praetor) the general principles upon which he would administer his trust during the year of his service, and which some years later made it expressly obligatory upon him to adhere during the year to the principles which he had so announced. And these exactions were as applicable to weighty matters of interpretation as to those of grace. In fact the edict must be reckoned among the leading influences tending toward the permanent fusion of the Praetor's interpretations with his boons into one body of new law, standing out in opposition to the old *jus civile*. The annually renewed union of the two, and to a great extent their confusion in the same manifesto could not fail to encourage such a classification. In the edict-compelling laws above noticed, in the ever-growing tendency of Praetors to promote uniformity by reiterating largely the edicts of their predecessors, in the cumulative force of such reiteration, and in the final crystallization of the edict in the hands of Julian during Hadrian's reign, we see the principal Roman phases of that ripening of grace into law which in England had for its salient points the selection of lawyers instead of ecclesiastics for the Chancellorship, the gradual acquisition by equity precedents of a binding force, the subjection of the Chancellor's decrees to review by the House of Lords, and the ultimate exhaustion of his capacity to recognize equities new in principle.

The tendency of a system of grace to mature into an auxiliary body of law and the inconveniences incident to such a double growth having been thus plainly exhibited in Roman experience, and that experience having at length also illustriously developed the constructive capacities of legislation and of refined interpretation, it may seem strange that the English did not dispense with the circumlocutory and complicating

methods of grace, and rely upon legislation and interpretation for the refinement and expansion of their nucleus of customary law. That instead of doing so they reaffirmed the functional dissimilitude of law and grace, the distinctness of their spheres, and the essentiality of both to a complete administration of justice, even more insistently than the early Romans, and carried the distinction to the length of administering law and grace through separate tribunals, is a matter of many-sided interest.

It denotes, to begin with, the native strength of the early predilection in favor of a prerogative of grace. It illustrates also how largely each age must work out its progress, through agencies and methods commensurate with its own capacities. As in all other lines of progress largely implicated with popular modes of thought, a knowledge of methods employed by maturer societies proved of little avail; each age being committed by its own limitations to working in its own way, with its own instruments. It is to these natural laws of growth, rather than to the obdurate addiction of any particular generation of judges to methods abnormally or culpably rigorous for their day, that the failure of the English to dispense entirely with a prerogative of grace in civil matters must be ascribed.

Sometimes the supposition has been indulged that however expedient recourse to a theory of grace may have been, our common law judges were remiss in not averting the evils of a divided jurisdiction by themselves arrogating the function. But this is again to underestimate the force of the natural tendencies by which the course of events was controlled. It is no doubt true that after a system of grace has hardened into a precedent-bound body of law, its administration is a purely judicial matter, and that thenceforth the only excuse for maintaining the

distinction between the two kinds of law is the difficulty of effecting their fusion. But so long as equitable interpositions remain a matter of grace, they are in both popular and legal thought too distinctly representative of royal prerogative to seem capable of assumption by magistrates as largely removed from royal influence as our common law judges were, and as exclusively committed as by oath and otherwise they were to administer justice "according to the golden metewand of the law, and not by the crooked cord of discretion." Sovereign grace is one of a motley group of prerogatives lying so closely along the border line of the legislative as to cleave tenaciously to the personality of the sovereign. They are prerogatives, often of doubtful repute, variously entitling the supreme administrator, within vaguely defined limits of emergency, to temporarily supplement, qualify, dispense with, or neutralize, the law: as by making ordinances, by issuing proclamations, by issuing *privilegia* displacing legal rights in certain cases, by pardoning offenses, by suspending the writ of *habeas corpus*, by dispensing with statutes under certain circumstances, and by the exercise of such extraordinary jurisdictions as those of the Star Chamber and the Court of Requests. They are prerogatives that tend to shrivel, or die out, as the law matures, but which so long as they subsist rarely, and then very slowly, pass beyond the control of the Chief Magistrate, with whose majesty they are intimately associated.

It is therefore only in the hands, or under the immediate control, of a Chief Magistrate, that law and grace are likely to be jointly administered. When the interpretation of the law passes into purely judicial hands, it has gone where a prerogative so broadly administrative and even approximately legislative as that of grace is unlikely to follow. The clue to the Roman system of

joint administration of law and grace is thus seen to lie in the fact that the Praetor, as successor of the King in the distribution of civil or private justice, did permanently retain, instead of delegating to judges, the power to interpret and apply the law. His retention of that power was a natural consequence of the generally recognized failure of the Romans, in common with all other ancient societies, to disengage the judicial functions, upon principles of constitutional policy, from the executive functions of which originally they are deemed a part, and to erect them into an independent department of government, not only self-protecting but capable of operating as a check upon other powers.

It may seem that the Romans did all of this, when they created the high office of Praetor and confided to him as his principal duty the administration of law in all civil causes. But the arrangement was both inspired and maintained by considerations of convenience only, without any reference to a theory of constitutional checks and balances, and without any pretense of effecting a separation of the judicial from the other administrative powers. In establishing their republic, the Romans had turned the kingly power over to the consulship practically unshorn and undefined, looking, almost entirely, for security against its abuse to the expedient of annual elections, and to the device of electing two consuls instead of one, each of whom should have power to nullify any act of the other. The consuls were in substance two annually elective kings whose powers were tempered by their capacities of mutual interference. The tenacity with which throughout the republican period the Romans adhered to these two simple and somewhat crude constitutional checks, and the ingenuity and success with which they exploited them in all departments of their government, no doubt

go far to explain their failure to make more progress than they did in the direction of many of the constitutional methods which, as a result of a more complete analysis and also of a more skillful synthesis of governmental powers, are finding favor in the modern world.

However this may be, it is certain, as stated, that the creation of the Praetorship, which was substantially a third consulship, after the two consuls had proven inadequate to the discharge of all consular functions, and the apportionment of consular duties between Praetor and consuls, was no part of a scheme to segregate the judicial powers. All jurisdiction over matters of public law, including criminal prosecutions, although there the hazard of consular abuse was greatest, was left with the two original consuls. With respect to civil causes, or matters of private law, the Praetor took all consular power, which meant practically all kingly power, in its complex entirety, executive and judicial. Nor does the later history of Rome disclose any close approach to that conception of the judiciary as one of three distinct and independent departments of government which was first given world currency by Montesquieu about the middle of the eighteenth century, confessedly as a derivative not from Roman institutions, but from what he saw going on about him in England and doubtless to some extent in his own country and Germany.

The differences between judicial and other administrative functions were of course obvious enough to the ancients, and commonly enough figured in divisions of official labor. But for its present state of complete individuation and power, the judiciary is mainly indebted to four distinctly modern conceptions, which, though not of universal acceptance, are fairly represen-

tative of the modern drift. These are, that a separation of the judiciary from the executive department is indispensable to a due cultivation and observance by the former, of the methods, ideals, and limitations appropriate to its own peculiar sphere; that the power of interpreting and applying the law should be vested in judges professionally learned in and exclusively devoted to it; that the judiciary should be employable as a check upon executive encroachments; and finally, as the contribution of America, that it should be similarly employable as a bar to even legislative infringements of constitutional law.

It seems clear, therefore, that the contentment of the Romans that their Praetor should remain both sovereign dispenser of executive grace in civil matters and personal interpreter of the law, was only a symptom of their more general failure to distinguish judicial from other administrative functions with a completeness comparable to that attained in modern times. Their neglect as already noted, singular from our point of view, to make any provision for indicating in which of what seem to us his two capacities the Praetor spoke in any particular instance, or to discriminate in any way or for any purpose between the two classes of utterances, is only another token of the same thing.

In England, the die was finally cast in favor of a divided jurisdiction when, slightly before the definite establishment of the Chancellor's Court of Conscience, the right of the common law courts to interpret and apply the law free from royal dictation was substantially realized. This may be dated from about the period of the first three Edwards, when, by acts of Parliament, royal interference was forbidden, and when the judges assumed the right to quash, if in their judgment illegal, original writs issued from the King's

Chancery. From that time the King's influence over judges was mainly such as attached illicitly to his power of removal, which was not formally abolished until by the Settlement Act of 1701.

No movements in English history have been less the result of accident or caprice, or more in keeping with racial traits, than this advance of the judiciary toward independence, and the drawing of sharp lines of discrimination between matters of law and matters of grace. For the common source of the two tendencies, we must look to the same conditions to which the peculiar efficiency of the English in internal affairs of state generally has been very justly ascribed: viz., to their unprecedentedly clear conception of government as a reign of law, and to the unrivaled constancy, insight, and shrewdness of method with which they have pursued this conception as a national ideal.[1]

It could not escape early notice that with such an ideal nothing could be more incompatible than a judiciary subservient to executive bidding, or than the presence anywhere of inordinate and irresponsible powers of administrative discretion. The aspiration of the English for an independent judiciary was largely an anxiety to disentangle their law, by which, with all its imperfections, they were content to be governed, from the menacing administrative prerogatives by which, while its interpretation lay within the King's control, it was in danger of being overgrown. The aim, in other words, was to minimize prerogative's oppor-

[1] The facts illustrating how much this principle of law domination has meant in the life of England are too voluminous for reproduction here. Readers interested in tracing them will find them admirably developed by Professor Dicey, in part second of his Law of the Constitution. It is only in their light that the suggestions here submitted can be justly appraised.

tunities of encroachment upon law. For of royal prerogative in all its phases, even as warily defined by Locke as "the discretionary power acting for the public good where the positive laws are silent," the English have been so inveterately distrustful that in the course of ages they have not scrupled to filch from it everything but its shadow.

Equally pronounced has been their distaste for postulations of natural right. For the law to whose ascendancy they have been so devoted is positive law imposed by way of either custom or legislation as judicially construed and operating with the certainty and uniformity characteristic of such law. They have been constitutionally jealous of all judicial methods that would fitfully expand the area within which conduct can be subjected to legal constraints, by recourse either to magisterial discretion or to chameleonic notions of natural law. Their idiosyncratic stress upon the dividing line between law and morality is a commonplace of comparative jurisprudence, and in many interesting ways is reflected in the national language, literature, and institutions. It is seen in the much remarked absence from our language of any word habitually used like the Roman *jus*, the French *droit*, the Italian *diritto*, the Spanish *derecho*, and the German *recht*, as broadly descriptive of all right irrespective of its enforceability or non-enforceability by public authority, and in our reliance upon the distinctive word *law* to designate principles of right that are so enforceable. Hence also the irrepressibility, in England, of the strictly indigenous and insular philosophy of Hobbes and Austin, which has been so long able to maintain at home the claims of Leviathan's law against all comers. Hence, again, the proverbial sterility of English soil for all other philosophies of law. So, the English

rejection to a great extent of Roman law is distinctly referable in part to the fact that as in England that law could claim only the rank of an elaborated morality, it encountered the full exclusionary force of the lines by which Leviathan's law was thus jealously discriminated from morality generally, and in part to the fact that from an English point of view the Roman polity in all its phases was dangerously overcharged with administrative discretion, and imperfectly subdued to the principle of law domination.

Toward both the factors entering into the prerogative of grace, viz., undefined administrative authority, and the conception of a constraining force in natural right, the attitude of the English mind has thus been one of distrust. The disfavor with which popular sentiment viewed the intrusion of the King's conscience into legal disputes is voluminously attested by the reiterated protests made by the Commons to the Chancellor's interpositions, for upward of a century after he succeeded to the Council's equitable jurisdiction. It was thus rather in defiance of public sentiment than responsively to it that the King's grace was dispensed, and the foundations of equity laid.

Summarizing, we may say that in the Englishman's peculiar appreciation of government by defined and positive law, there was implicitly contained a corresponding antipathy to government by administrative discretion, or by speculative assumptions of natural right. These latter two, whatever else they might be, or however necessary to a complete administration of justice, did not present themselves to his mind as law. And the very thoroughness with which he discriminated their nature from that of law bespoke for their administration a tribunal not only distinct, but different in kind. The bent thus naturally produced

toward separate tribunals and jurisdictions for law and grace was reinforced by a feeling which, at least throughout equity's formative period, permeated all orders of English society, that in two ways such a separation would tend to maintain the integrity of the law. It was feared that a magistrate accustomed to wield a prerogative of such amplitude and license as that of grace would become perilously indifferent, even when acting judicially, to the methods and limitations by which the judicial faculty is normally restrained. It was also accepted theory that against abusive exaggerations of grace, the best of safeguards would be a separate, co-ordinate, yet competitive tribunal, charged with the vindication of the common law, and capable of interposing a degree of resistance to excessive encroachments upon it. As expressed by Lord Bacon, "the common law hath a kind of rule and survey over the chancery, to determine what belongs to the chancery." That these intuitions, or modes of reasoning, as the case may be, were both characteristic and correct admits of no doubt. The Chancellor's circumspection was redoubled by confronting him with the judges. However much opinions may differ as to whether the advantages thus secured were more than counterbalanced by inconveniences which the division of the jurisdiction entailed, that division was too efficient a means toward a wise end, and too natural an outgrowth of some of the most estimable of Anglo-Saxon traits and methods, to be ranked as either absurd, accidental, or perverse. Neither, when viewed from the standpoint of the above-noted general laws of development, and in the light of the modern tendency to segregate the strictly judicial from other administrative powers, can it be deemed in principle as eccentric as has been generally assumed.

CHAPTER V

PROCEDURE AS A FACTOR IN ENGLISH EQUITY

The relation of procedure to the rise of English Equity has been in one respect a curiously ill-fated subject. By a variety of laudable motives, men have been tempted more or less deliberately to distort it. Those patriotically attached to the law, in their anxiety so to interpret the distinction between law and equity as to relieve their country's laws from the opprobrious appearance of mutual contradiction, the reformer in his desire so to interpret it as to facilitate the fusion of the two systems, the analyst of the law in his pardonably frantic efforts to harmonize legal and equitable rights, even the Chancellor in his solicitude to minimize in particular instances the appearance of innovation, have all been interested to exaggerate the part played by procedure.

Everyone indeed who has had any sort of interest in minimizing the unwelcome distinction between law and equity, has been swift to believe, or to make believe, that the divergence has been only in the matter of remedial forms. And within this class nearly all of us may be said to have fallen. For who has not, at one time or another, had such misgivings about the propriety of our judicial double-mindedness, about the normality of our Janus-faced Goddess of Justice with the supernumerary and mutually impeaching scales, as to be willing to blink a few specious *non sequiturs* and anachronisms, in order to feel assured that, after all, the appearance of conflict was illusory and that equity's

sole function has been, by the loan of a more effective procedure, to assist the common law in giving effect to the latter's own ample conceptions of substantive right. To this temptation we become immune only as we realize that the subsistence side by side under the same sovereignty, as in both Roman and English experience, of partially conflicting systems of civil right, however illogical it may seem when viewed retrospectively, is a normal incident of one of nature's capital methods of legal progression, which as a transitory phase of any unfolding jurisprudence is neither incredible nor discreditable.

As already indicated, such a clashing of systems has for its rationale that law and justice, as advanced societies think of them, instead of being elemental or primitive conceptions, are painfully belated composites, in which rigor on the one hand and mercy on the other, after centuries of strife and mutual attrition, are conciliated and combined; and that throughout the early stages of the struggle, mercy does not to any great extent present the appearance of being a part of the system of law with which it finally coalesces.

Had the equitable boons of Praetor and Chancellor been originally conceived as either amendatory or interpretative of the old law — as either legislative, or within our appreciation of the term, strictly judicial, they would have taken effect directly upon the old law by way of additions to or subtractions from it; and neither Praetorian law in Rome, nor equity in England, would ever have existed as a distinct system. The idea that the old law remained unmodified by the interferences of Praetor or Chancellor was wrapped up in the pristine conception of such interferences as detached favors or acts of clemency akin, as already noticed, to the pardon of a crime. That idea, long

before grace ripened into law, was too deeply rooted to be weeded out. Nor was there in the course of the transition any opportunity for a substitution of theories, so imperceptible were the stages of its progress. So that when finally the boons arranged themselves into a system, and became a species of law, the anomaly of continuously conflicting legal systems was unavoidably presented.

Such a conflict is of course less distracting than it sounds. For what it imports is not an absence, but only a crude method of co-ordination. The conflict is not real, in the sense that it involves any clash of different sections of State force. The finality of the new system is acknowledged, and its methods of asserting its supremacy defined. The old law, so far as it becomes subject to frustration by the new, loses that ultimate force which is the essential quality of law. It is degraded into the position of an inconclusive law observed by a particular tribunal or system, but not constituting the last word of the State: a species of incompatiblity of not uncommon occurrence while legal generalizations are incomplete.

A familiar instance is the case of Canon Law. Emanating as that law did from the Church, and leading up as its procedure did to the Pope as court of last resort, it assumed the proportions of a vast jurisprudence which wrestled long and mightily with secular law for the judicature, upon its own principles, of immense really secular tracts of conduct, both civil and criminal. Yet its reign in England was only with the sufferance of the State, which without undertaking to so revise or supersede its doctrines as to harmonize them with common law, would prohibit and forcibly restrain the exercise in particular cases of a jurisdiction that was deemed unduly subversive of common law. "That

one court," say Pollock and Maitland with reference to such collisions of authority, "if it has received no prohibition, should have a right to do what another court can prohibit it from doing, need not surprise us; this in the Middle Ages is no antinomy."[1] It was an age in which, characteristically, the law was compelled to roughly co-ordinate its discordant elements, not as later ages would by blending them through processes of mutual attrition into a harmonious whole, but by determining to which, in case of conflict, primacy should be accorded.

The inconveniences that flowed from the separation of the law and equity jurisdictions in England were the added cost and delay incident to the double litigation or circuity of proceeding sometimes necessitated, and the hazard of mischoosing one's tribunal. As these were no less annoying to one who sought in equity relief from the common law's remedial inadequacies than to one who sought relief from its substantive defects, it would seem to be no less unreasonable to require a litigant to rummage over two courts for remedies which might as well have been included in the equipment of one, than to require a similar double recourse by a litigant in search of substantive principles. Nor were such inconveniences in any way increased or diminished by the degree of inconsistency presented in any particular case between substantive doctrines of law and equity, so long as the Chancellor did not overstep the limits within which the finality of his action would be acknowledged. Within those limits, it was as practicable to administer an equity that flatly contradicted the law, as one that only added efficiency to its procedure.

[1] 2 Pol. & Mait. Hist., 200.

Yet the traditional favor with which processual pretexts for recourse to Chancery have been regarded, and the related anxiety to repel any supposition of inconsistency between the law's and equity's substantive principles, are not difficult to account for. In the first place, it is no lack of consciousness of the impropriety of discordant bodies of law that reconciles a partially developed society to tolerate them. It is lack of the constructive skill necessary to their complete fusion. In the meantime, that theory of the relations of the conflicting systems which most effectually minimizes their appearance of mutual opposition is inevitably the favored theory. Again, in the case of the Chancellor, encroachments upon substantive law were so jealously regarded, and apart from cases of fraud, accident, and trust their permissible limits were so undefined, that prudence dictated that in all cases where with any show of plausibility it could be done, prerogative interpositions should be put upon the ground of merely processual assistance to the law. For there must have been always a misgiving that even the life of the prerogative might depend upon moderation in its exercise.

It was inevitable that in a multitude of instances the common law's substance and procedure should be so commensurated, that for rights recognized by equity but not by the common law there should prove to be in the latter's forms of pleading, evidence, trial, judgment, execution, or other points of practice, some remedial methods less efficient than those offered by equity. If, therefore, we are willing to indulge in the fallacy that whenever for the enforcement of a given right which equity does recognize, and law does not, the common law's procedure is less efficient than equity's, the absence of the right at law is to be ascribed to this inefficiency

of procedure, there is scarcely a limit to the number of equitable doctrines that can be thus sophistically accounted for upon procedural grounds. Even the law's disregard of uses and trusts we may thus inconsiderately impute to its comparative unfamiliarity with processes of personal compulsion; its unconcern about confidential relationships generally, to the fact that its modes of pleading and proof were poorly adapted to their investigation; its non-enforcement of contribution and subrogation, to the incapacity of its procedure to deal with controversies that are likely to be many-sided; its insensibility to certain forms of fraud, to the fact that they were of kinds that its "stiff old procedure could not adequately meet," and so on indefinitely. Whether, for its refusals of relief in such cases, the common law may not have had other reasons than the narrowness or inefficiency of its remedial forms, this mechanical method of reasoning does not inquire.

The tendency to bring diversities of procedure into unmerited prominence, and to use them in ostensible explanation of really substantive reforms, is well illustrated in *Cannel* v. *Buckle*,[2] where, despite the common law rule that a contract becomes extinct upon the intermarriage of the parties to it, Lord Macclesfield enforced in favor of a husband against his wife's heirs a bond which she had given him before and in contemplation of marriage. To gloss over his deviation from the common law of the married relation with some color of a processual origin, he said the foundation of the idea that the bond was destroyed by the intermarriage was "that at law husband and wife being one person, the husband cannot sue the wife on this agreement, whereas in equity it is constant experience that the husband

[2] 2 P. W. 243.

may sue the wife, or the wife the husband." But the incapacity of husband and wife to sue each other flows from the sweeping principle of substantive law that they are but one person — that the personality of the wife is merged in that of the husband. That the incapacity to litigate with each other is the effect, not the cause, of the substantive law of this subject, we know from the many applications of the latter that lie beyond the range of any possible influence of the former: such as the rule of construction that under an enfeoffment of husband, wife, and another, the third party would take one moiety, and husband and wife only the other. The true ground of Lord Macclesfield's departure from common law principles was pointed at by him, when he declared it "unreasonable that the intermarriage upon which alone the bond was to take effect should itself be a destruction of the bond." Differing from the ordinary case of a contract between parties happening afterwards to intermarry, the situation was one in which the intentions of the parties, reduced to contract and sanctified by the passage of valuable considerations in distinct contemplation of marriage, were directly and consciously pitted against the legal construction which merged the personality of the wife. The law would abate nothing from its fiction of merger. Yet equity, with characteristic antipathy to unbridled generalities, and with its customary deference to intention and consideration combined, assumed to postulate a subsisting obligation despite the marriage. Her diplomatic method of doing this, however, was not to contradict the law as to the extinction of the bond, but to find in the original agreement of minds, the passage of considerations, and the bond's technical extinguishment, the components of an "equity" entitling to relief. It is possible that

equity was encouraged to this virtual reversal of the common law partly by the fact that it was within the power of the parties to have obtained a similar result by running the antenuptual contract to a trustee for the proposed husband or wife — a consideration that figured quite visibly in the ultimate equitable recognition of postnuptial contracts—upon the theory that the trust itself was after all a matter of form with which equity might dispense — a kind of compounding of equities. But if such were the fact, it would only serve to illustrate the variety of agencies that were available to facilitate equity's interferences with the law. As to the frequency of suits in equity between husband and wife noticed by Lord Macclesfield, they were, with rare exceptions, due not to any merely remedial peculiarity of equity, but as in *Cannel* v. *Buckle*, above cited, to equity's recognition under moral pressure of substantive rights not acknowledged by the common law.

The same policy that has at times actuated both Chancellors and commentators to ward off the appearance of conflict between law and equity, by supposing processual grounds for differences essentially substantive, has often led them to seek other points of view, from which sight could be lost of equity's impact upon the substantive law, and from which therefore with some color of reason the consistency of the two systems could be affirmed. The tendency is one having so much in common with, and shedding so much light upon, the expedient of exaggerating the part played by procedure, that it may well be noticed in this connection.

Indeed the overestimation of the influence of procedure may be regarded as only a principal point in the broader claim of substantive consistency. Among the capital resources for maintaining the consistency of law and equity has been the setting up of a supposed dis-

tinction between a legal right and its uses; and the disclaimer of inconsistency between the right and the limitations imposed by equity upon its use. Thus in the historic case of the *Earl of Oxford*, Lord Ellesmere insisted that he was not opposing the judgment whose execution he enjoined. He was, as he maintained, only enforcing a conscientious restriction upon its use; although the use which he enjoined was the only use of which the judgment was capable.

To Professor Langdell's attitude upon this subject reference has been made. Such a restriction in favor of one person, upon the unconscientious use of another's legal right, he regards as a true equity, and practically as the only true equity,[3] and he denies any inconsistency between the restriction and the right. Where conflict takes any other form, he recognizes it as conflict, and would reject as spurious the supposed equity involving it, upon the ground that equity must not be inconsistent with law, or in any manner "violate, interfere with, or affect it." Yet transparently, in point of substance, a legal right consists wholly in the beneficial uses that may lawfully be made of it. To curtail its permissibile uses is to subtract from the substance of the right.

Professor Maitland also, in the second of his Lectures on Equity, leads us to a viewpoint from which, as he supposes, practically all the seeming inconsistencies between law and equity disappear. He sounds very much as though arguing that the equity that awarded all rights of beneficial enjoyment to the *cestui que trust* was in harmony with the law that awarded them all to the trustee, and inferentially, that the law that com-

[3] This seems to be what he means by his insistence that "every original equitable right is derived from and dependent on a legal right vested in the obligor." Langdell's Brief Survey, 255, 254, 258.

manded the execution of a given judgment was in accord with the equity that forbade it.[4]

These contentions are all thoroughly in the spirit of the processual theory of equity, and are cited because representative of its familiar lines of reasoning. With respect to all of them, the important thing is to recognize that whatever else may be their purpose or meaning they cannot have been put forth as fairly descriptive of the indirect ultimate effect that was produced by an equity which had developed into a fixed rule, upon the availability of a legal right against the use of which it

[4] Speaking at p. 17, of the relations between law and equity prior to the Judicature Acts of 1873 and 1875, he says:

"And the first thing we have to observe is, that this relation was not one of conflict. Equity had come not to destroy the law but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done, something might yet be needful, something that equity would require." . . . "Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust.* There was no conflict here." And see also pp. 151–62. The cases of *Joseph* v. *Lyons*, 15 Q.B.D. 280, and *Britain* v. *Rossiter*, 11 Q.B.D. 123, which by Professor Maitland at p. 157 are construed as affirming the consistency of the equitable doctrines respecting part performance, and the sale of after-acquired chattels, with common law, quite clearly seem to go no further than to reject contentions that the effect of the judicature acts had been to *widen* equity's departures from the law. The comparative insignificance of the clause of these acts giving prevalence to the rules of equity where they conflicted with the common law, is due not to the rarity of such conflict, but to the fact that the clause was only declaratory of a precedence that had always been maintained by the equitable view, and that, except so far as actually overborne, the legal view always became incorporated into the equitable; it being for example as well recognized in equity as at law that the formal title vested in the trustee, and that upon the acquisition of previously sold chattels it was the equitable title only, and not the formal or legal title that passed on to the purchaser.

was aimed. There was a time when equity's claim of consistency with law was a pardonable artifice, as it seemed to facilitate her generally beneficent reforms, by judiciously masking their substantive character and true proportions. The figmentary character of the claim is so palpable, that it is difficult to understand how, at the present time, it can be reiterated as matter of fact.

There are, it is true, several circumstances that impart to the claim a certain degree of speciousness. Thus, it must be admitted that *as matter strictly of common law*, a common law right was in very truth absolutely unscathed by limitations imposed by equity upon its use. To carry along our recent illustrations, the same common law remedies were at the bidding of a trustee or an enjoined judgment creditor after Chancery's interference as before, the only difference being the imprisonment he might incur by accepting them. All that he ever had was a common law right and its remedies, and *as matter of common law* he had those still. Some color is thus lent to the idea that equity's limitations upon the use of legal rights do not clash with or impair those rights, and are not inconsistent with their continuance and integrity.

Again, between law and equity there was, it is true, no conflict in the sense of an actual collision between the physical forces at the command of the two tribunals. Still again, if we view the relations of the two systems from the standpoint of substance, what we see, as heretofore pointed out, is law and equity although formally distinct yet practically fused into some such harmonious whole as a modulated general rule and its exceptions, the co-ordination of the two systems being crudely effected, despite their nominal discordance and separate administration, by the *de jacto* finality of equity's mandates. It thus becomes possible to mistakenly accredit to an

alleged consistency of equity with law, a harmony that has really resulted from the virtual paramountcy of equity over law. The original and transitory clash or conflict may be lost sight of, in the substantial harmony ensuing upon the ascendancy achieved by the equitable view.

But all suggestions of consistency, from whatever point of view, are in fact the merest plausibilities; all appearances of it are deceptive. What they all betoken is not the absence of conflict, but a *contrived peculiarity in the form of conflict:* a peculiarity due partly to a limitation inherent in the nature of the Chancellor's power, and partly to his policy of concealing his correctory movements upon the law by recourse to indirections. The limitation was, that his interferences with legal rights must be accomplished without direct control over, or interference with, the courts of law. Had there been no method of doing this, it is impossible to say how far equity might have been dwarfed by the principle of the judiciary's independence. His method was, by command laid directly upon the holder of a legal right, to compel him upon peril of imprisonment to forgo it.

A thin, but very serviceable, and as we have had occasion to see, a surprisingly durable veil, was thus thrown over the fact that the obnoxious rule of law was thereby as effectually nullified in operation as though repealed. But one veil was not enough. Prudence led the Chancellor to throw out another. In order that an innovation might appear to be rather a supplement of the law than a correction of it, he studiously refrained, as a rule, from directly gainsaying the substantive law in any particular. But his opposition to the law, which generally he refrained from making by denial or contradiction, he could make with equal effect by processes of counteraction. It was not for him to meddle, so the theory went, with

legal institutes: not for him to revise the law of estates, inheritances, seisin, conveyancing, contract, or the canons of interpretation. His dealing was to be with but one institute — an equity. And universally, the theoretical effect of an equity impinging upon the law was not to impeach or qualify the law, as law, but merely to thwart its operation by the superior force of an antagonistic equitable right in the other party. An equitable parry of a common law rule was thus always only an incident of a counterstroke. The shield from the law's rigors furnished by the Chancellor to the suitor was invariably the "warlike shield" of Macbeth — not a breastplate but a sword. He was as vulnerable as ever to common law weapons, but found safety in the fact that with his "equity" he could strike a heavier blow than his adversary could hope to deal. His equity, although thus ostensibly an affirmative, independent right, reacted upon the law's actual operation as correctively as a repeal *pro tanto*, and in so doing only served the purpose for which it was contrived.

Viewing the subject in the combined light of law and equity, discarding fictions, and having regard to the substance of things, it is clear that from the time when any principle of law was overgrown by an adverse equity, it was, to the extent of the equity, virtually annulled in its operation. The conflict between the two, while slightly obscured by the gauze of artificial theory thrown about them, was none the less real on that account. The pretense of their consistency should have been frankly abandoned long ago, — though of course without losing sight of the influence which the pretension has exercised as a facilitator of equitable reforms.

Recurring to the theory that would vindicate the substantive consistency of law and equity by referring all their discrepancies directly or indirectly to their

differences of procedure, it is to be conceded with reference to the capital features of the procedure in English equity — its free use of personal compulsion upon litigants, and its provision for discovery, that they exercised upon the development of its substantive doctrines a profound influence. So pervasive an influence indeed, that it would be difficult to decipher how widely different a course in their absence, particularly in the absence of the former, equity might have run. That the substantive common law was less advanced than it would have been had its early procedure included something akin to equitable discovery cannot be doubted, considering the numberless respects in which the shapes taken on by substantive doctrines depend upon the capacity of tribunals for a searching investigation of questions of fact. The meager capacity of the common law for the sifting of facts would have been appreciably augmented by some such method as equity had of prying into the mind and knowledge of an adversary.

Substantive developments equally pronounced would no doubt have flowed from a free use by the common law of the methods of laying personal commands and compulsions upon litigants that are so conspicuous a feature of equitable procedure, since in legal development there is nothing more constant or inevitable than the reactions upon each other of substantive and adjective law. Conversely, equity's command over these two efficient remedial methods not only determined in many instances the particular channels and directions in which her substantive doctrines should move, but enabled her to carry some of those doctrines to a degree of development impossible in the absence of such methods.

Great as the interest is that thus justly attaches to the forms of practice in equity, there is nothing to justify the extravagance of those who assign to all

distinctively equitable doctrines a processual character or derivation, and who will have it that except as hampered by lack of procedural equipment, conscience was as dominant in courts of common law as in the King's Chancery.

We have already had occasion to notice that the prerogative of grace, whose interpositions, originally compassionate and sporadic, ultimately ripen into an equitable jurisprudence, was aroused into activity by the inherence in the common law of certain narrow methods of reasoning that infect all early law at its core. Whatever else their significance, these forms of procedure that filtered from the canonical courts through the King's Council (where they were reinforced by the power of imprisonment) into the Chancery, did not stand toward equity's peculiarly conscientious bent in the relation of cause or source. They were merely its opportune instruments, with such enlarging and constricting reactions upon it as are normal to the relation of motive and means.

Neither, speaking generally, did the absence of these forms of procedure from the common law stand toward the formalism, rigor, or narrowness of that law in the relation of cause or source. In the main, there is no difficulty in identifying those qualities as only a persistence of conditions common as above noticed to all early substantive law.

Probably no feature of equity has more encouraged the ascription of her activities and doctrines to the direct and indirect influence of her procedure, than her specific enforcement of agreements. The agreement, unlike a use or trust, being ordinarily an obligation upon which remedy by way of damages may be had at law, and the inadequacy of that remedy being a good enough reason, and equity's generally declared reason, for tender-

ing her more efficient process, it has been easy to assume that the jurisdiction of the latter in such cases is wholly referable to processual grounds. And although it is obvious that substantive equity accredits the agreement with greater inherent force than the law does, since it construes as done that which ought to be done, and accounts the contract to convey as for most purposes equal to a conveyance, it has been easy to assume that this is the result of a reaction of procedure upon substantive principle.

The vice in these assumptions is, that they magnify procedure into sole cause of doctrines to which it has been contributor only as one of several co-operating factors. As this is one of the most characteristic and persuasive applications of an inconsiderate method widely employed in the overestimation of processual influence, we cannot better serve our present purposes than by putting it to the test as perhaps the strongest representative of its class. It will be seen that almost everywhere, concurrent and interactive with equity's remedial processes, there have been at work peculiar phases of substantive principle for the essential spirit of which equity was not indebted to her procedure, however happily the latter may have contributed to the realization of the former. It is believed that the discussion will prove of interest enough to justify itself though there is danger that the patience of the casual reader may be strained.

Taking, then, equity's substantive doctrine that for most purposes a contract to convey is equal to a conveyance, and in its bearing upon contracts, the more general maxim treating as done that which ought to be done, how are they related to her use of the mandatory process to enforce the specific performance of contracts? Are they an effect of it, or the cause of it, or

must both horns of this alternative be rejected in favor of some still different theory?

By Professor Langdell these doctrines were regarded only as a figurative way of expressing the facts that equity does specifically enforce agreements to convey, and that the fiction of relation then gives effect to the conveyance as of the date of the agreement.[5]

More could be said in favor of the view already suggested, that although equity does entertain a greatly intensified conception of the agreement as a transaction that actually binds and virtually transfers the land, she does so only because enabled by her peculiar process to make that conception good, the process being thus regarded as the cause, and the substantive doctrines as the effect.

On the other hand much might be said in support of the opposite view, that equity's estimation of a contract to convey as a conveyance is the cause rather than the effect of her interposing to specifically enforce contracts.

That the two things are not, in either way, related as cause and effect, is suggested by the fact that either

[5] This is merely a translation of the equitable view, as nearly as practicable, into terms of common law. It is a theory that would have been characteristic of the common law when it was working out the specific performance of covenants to convey through the old writ of covenant. But there is nothing within the writer's knowledge to suggest that equity either needed or actually utilized the idea of relation back, in construing away largely the distinction between conveyance and contract to convey. The doctrine of relation has for its principle the conceivable unity of several successive and in a sense distinct acts, and the treatment of the unified act as forceful from its point of inception. Equity, in exalting contract into conveyance, acted upon the very different conception that agreement based upon consideration is a self-sufficing vehicle for the instantaneous transfer of the substance of ownership.

may be applied though the conditions are such as to preclude the application of the other.[6]

The true view of the matter, and that to which the cases give most countenance, is that equity's employment of her mandatory process for the specific performance of agreements was not either cause or consequence of her partial disregard of the boundary line between contract and conveyance. Although the two things indispensably supplemented and interacted upon each other, they were parallel sequences of one cause: namely, of that exalted estimate of the force immanent in intention and consideration as the efficient principles of transactions from which equitable doctrine is so largely derived. The general maxim that as far as possible had for its aim to bring about the effects of duty performed by sheer force of juridical construction, the application of that maxim by which contract to convey was assimilated to conveyance, and the employment of mandate and imprisonment to compel the specific performance of agreements, were sister expedients of the Chancellor for making as conclusive and as nearly self-executing as possible the intention and consideration; compared with which he accounted all else matter of form. So also was the favor with which proverbially equity regarded liens.

It was from this point of view that Francis, writing on Maxims of Equity before Blackstone's time, put forward the specific enforcement of agreements as his foremost illustration of the maxim, "equity regards not the circumstance but the substance of the act." He ranked it as an analogue of the supply by equity of

[6] Lord Macnaghten in *Tailby* v. *Official Receiver*, 13 App. Cas. 546–9. *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547. *Mornington* v. *Keane*, 2 D. & J. 292.

defects of form and circumstance in conveyances or livery, or in the execution of powers.[7] In this he followed the reasoning in the *Earl of Coventry's* case, and in still earlier decisions. In the *Coventry* case a life tenant with power to make a settlement upon his wife having agreed by his marriage articles that he would make the settlement but having died without doing so, the question was whether, in the hands of the remainderman, the lands were bound. Chancellor, Judges, and Master of the Rolls agreed that they were, upon the ground that substantially the power was exercised by the articles, the lacking deed of settlement being henceforth like any other formal defect that a court of equity would supply in aid of the execution of a power.[8]

By Mr. Baron Price it was said: "It is the honor and glory of a court of equity to reduce all acts into execution as near as possible to the intention of the parties; and hence it is that we see constant application made to such courts for a specific performance of articles and other incomplete agreements which the parties at law could have no compensation for but in damages. *They go always upon this, that where the substance of the agreement is performed, they will supply any defect in the form.*"

By Sir Joseph Jekyll, M.R., it was said: "The aiding an imperfect conveyance, and the carrying into execution a covenant to convey, stand upon the same foot in all respects. If tenant in fee makes an imperfect conveyance for a valuable consideration, this court will supply the defect, and decree an effectual conveyance

[7] Maxim XIII.

[8] The case is reported in 2 P. W. 222, 1 Strange 596, 9 Mod. 12, and best of all as an appendix to the Maxims of Equity.

to be made. So in like manner will this court decree a conveyance, if he covenants for a valuable consideration to convey."

By Mr. Baron Gilbert it was said: "In all cases where an agreement is entered into in contemplation of a valuable consideration, when that is performed *it is but justice and conscience* that the purchaser should have an immediate right and *ownership in* what he hath so purchased. And *therefore* a court of equity, before the execution of any legal conveyance, looks upon the party to be in immediate possession of such estate, and to have a power of devising and giving it away."

The propriety of these views, often reaffirmed, never has been questioned. *In re Dyke's Estate*, Sir Samuel Romilly, M. R., in holding an unsealed contract to execute to be in equity a good execution of a power of appointment by deed, said: "Now the principle upon which a court of equity proceeds is, that when a person enters into a contract for the execution of a power of appointment, for a valuable consideration, but does not carry it into effect and exercise the power, the court will supply the defect. . . . . If he had carried this contract into effect and executed a deed, there would have been a good execution of the power, and I am therefore of the opinion that this is a case *bound by the general rules of equity* with respect to the defective execution of powers." [9]

"If," said Lord Eldon in *St. Paul* v. *Dudley and Ward*, "tenant for life of a manor having a power to grant, covenants to make a grant, that would in equity bind the remainderman, *being in the nature of an execution of the power*." [10]

[9] L. R. 7 Eq. Cas. 337, 342.

[10] 15 Ves. Jr. 173.

It will be noticed that the tendency of this line of cases to disclose with more than usual distinctness the substantive equitable principle underlying specific performance, is due to the fact that confessedly there is not in equity, any more than at law, any virtue in a bare personal contract of the life tenant, which either court by any form of process would be justified in enforcing against the remainderman. The specific enforcement against him of a purely personal contract of the life tenant would be as impossible in equity as damages against him for its breach would be at law. Strictly speaking, the agreement to execute the power takes effect against the remainderman not at all as a common law contract but as an equitable conveyance, the contract with its consideration being esteemed by equity as in point of substance the very conveyance which the law considers missing. Although exactly the same principle underlies specific performance when directed against subsequent purchasers or other successors in interest, in the ordinary instance of a contract for the sale of land unconnected with a power, or in the case of a contract for a charge upon land or of a negative covenant restricting the uses of land, and of other kindred situations, its presence there has been somewhat obscured by the fact that, to many, it has seemed possible that in such cases the relief might be worked out upon common law principles of purely personal contract operating in combination with equity's mandatory process. The impracticability of this will be noticed further on; and these cases disclose that the relief is now confessedly referable to the fact that the right is not personal but real. Further illustration that specific performance against a successor in interest is not explicable upon any theory of purely personal contract, and is dependent upon the principle of equitable conveyance or charge,

is supplied by the fact that a contract for the sale of foreign lands cannot be specifically enforced against a subsequent purchaser though he bought with notice of the contract. It was so held in *Norris* v. *Chambers*.[11] The principle of the decision, though not very clearly disclosed, undoubtedly is that with which we are now dealing, *i.e.* that an equitable right to land cannot be enforced against a subsequent purchaser upon any principle of personal contract or fraud,[12] or otherwise than upon the assumption that the right is proprietary, and that the eccentric features of our law which make it proprietary cannot be applied to foreign lands.

The Chancellor's reason for imputing to terms of contract the efficacy of conveyance was that from his point of view, as so plainly brought out in the *Coventry* case, he found in the union of intent and consideration the heart of the whole matter — the very dynamic by which, rather than by any ceremony of sealing or livery, the substance of ownership was actually curtailed or transferred. He reached his result, not only in his own estimation but in truth, not by recourse to fiction but by asserting, candidly and searchingly, the supremacy of substance over forms: the fiction that the agreed thing had been done being not strictly a ground of the equitable view, but rather a mode of mediating between the equitable view and the legal.

This seems to have been the principle of *Hughes* v. *Morris*,[13] which, as already noticed, was criticized by Professor Langdell as implying that "the operation of a

[11] 29 Beav. 246, and 3 DeG. F. & J. 583.

[12] Fraud only becomes predicable in such a case upon the principle that property is being appropriated to one person, which in contemplation of equity belongs to another. 35 N. Y. 90; *Potter* v. *Saunders*, 6 Hare 1, 9. *Daniels* v. *Davison*, 16. Ves. 249.

[13] 2 DeG. M. & G. 349.

contract as a conveyance in equity was not the consequence of specific performance, but that the latter was the consequence of the former."[14] The question there was whether, under a statute requiring the certificate of registry to be recited in any instrument transferring the property in a ship, a court of equity would, as between the original parties to it, enforce specifically a contract for the sale of a ship in which the certificate of registry was not recited. Had it been permissible to treat the document as a purely personal contract, it would not have been brought within the statute's purview by the fact that specific performance would relate back, and so, only the original contractors being concerned, might have been enforced as Professor Langdell thought it should have been. But the court justly deemed itself barred by its general principles from treating it as anything less than an equitable conveyance, which brought it within both the letter and the policy of the act.

This is far from being the only case in which a negative has been placed upon the contention that the equitable doctrine of present conveyance through contract to convey is made up out of the specific performance of bare personal contracts, coupled with the doctrine of relation back. The claim has been overruled as often as presented. In *Metcalfe* v. *Archbishop of York*,[15] an equitable charge was enforced by Lord Cottenham although of a kind prohibited by a statute passed between the date of the contract and the time of the suit, although, paralleling Professor Langdell's above

[14] Langdell's Brief Survey, 62–4.

[15] 1 My. & Cr. 547. That "an instrument that gives a person an equitable charge upon land, gives him an interest in the land," is now well settled. It is a present conveyance. *Credland* v. *Potter*, L. R. 10 Ch. App. 12.

cited criticism upon *Hughes* v. *Morris*, it was strenuously urged that an equitable charge is no interest in the land, but is only a right to secure a legal charge through specific performance, and that what the court was asked to do was to create the charge contrary to the statute.

A similar principle seems to be involved in such cases as those that held an equitable conversion to persist, despite the loss by laches of the right to specific performance.[16]

It was upon the principle of the *Hughes* and *Metcalfe* cases that a covenant by a purchaser, to reconvey under certain circumstances without limitation as to time, was afterward held void as creating a perpetuity.[17]

[16] *Curre* v. *Boyer*, 5 Beav. 1. *Keep* v. *Miller*, 42 N. J. Eq. 100

[17] *London & S. W. Ry. Co.* v. *Gomm*, 20 Ch. Div. 562, 580. The decision of Jessel, M.R., in this case, afterward quoted approvingly in the Court of Appeal, in *Rogers* v. *Hosegood*, 1900,2 Ch. 388, 404–5, well illustrates the extent to which, in connections such as this, equity deals directly and independently with principles of substantive law and not merely with procedure and its corollaries. He said: "Whether the rule against perpetuities applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract, it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate." . . . "The doctrine of *Tulk* v. *Moxhay* appears to me to be either an extension in equity of the doctrine of *Spencer's* case to another line of cases, or else an extension in equity of the doctrine of equitable easements; such for instance as the right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light." . . . "This is an equitable doctrine establishing an exception to the rules of common law

Clearly it would have been otherwise had the covenant been deemed purely personal, though capable

which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land, or on analogy to a easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." That in its dealings with these subjects the starting point of equity is in its translation of the law's personal contract into a real contract or conveyance, is also well brought out by Farwell, J., in the matter of *Nisbet and Potts' Contract*, involving the force of covenants restricting the use of land, 1905, 1 Ch. 396, 397–8, the reason for the translation being, as already noticed, that equity regards the distinction between them as matter of form, the essence of each lying in the consideration and agreement of minds. He said: "Covenants restricting the enjoyment of land, except of course as between the contracting parties and those privy to the contract, are not enforceable by anything in the nature of action or suit founded on contract. Such actions and suits alike depend on privity of contract, and no possession of the land coupled with notice of the covenants can avail to create such privity. *Cox* v. *Bishop*, 8 D. M. & G. 815. But if the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property, of such a nature that it is annexed to and runs with it in equity. *Tulk* v. *Moxhay*, 2 Ph. 774. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to, an equitable charge on real estate created by some predecessor in title of the present owner of the land charged. Such a charge was created in its inception by contract between A and B, the lender and the borrower, but when B has sold the land charged to C, A cannot sue C on the contract to repay, but can only enforce the charge against the land." . . . "The fact that the usual contest in such cases is whether the landowner had notice or not, has doubtless made it usual to speak of notice as an essential part of the plaintiff's case in order to enable the court to bind the defendant's conscience; but it is quite clear that the equitable charge is created and exists independ-

of eventuating in an estate through specific performance.

If, in a given case, equity fails by construction to impart to the contract immediate effects characteristic of conveyance, it will generally be found due to the absence of sufficiently specific descriptions, as in *Mornington* v. *Keane*,[18] or to circumstances indicative of an intention not presently to bind the property, as in *Kennedy* v. *Daly*, where a covenant by a papist in his marriage articles to "convey his lands to trustees in strict settlement, in case he should at any time thereafter during his life be qualified by law so to do," was held not to bind the lands prior to the enactment of a qualifying law, so as to withdraw them from the lien of judgments obtained in the interim. The intent not to bind the lands presently was inferred by Lord Redesdale from the terms of the contract, taken in connection with the fact that the obligor should not be presumed to have intended that which would have subjected his lands to forfeiture.[19]

In interpreting a tender by equity of a new remedy for an old or legal right, it is necessary to be on our

ently of notice, and that no question of binding the defendant's conscience arises until he sets up the legal estate. Then notice became material, because it enabled the court of equity to bind the conscience of the defendant and forbid him to set up the legal estate. Under the old law, if the legal title were used at law for a purpose inconsistent with good faith, then undoubtedly this court would interfere on the established principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose."

[18] 2 D. & J. 292. Into cases of this class, the principle of the *Kennedy* case, next cited, sometimes enters as a factor, from the unreasonableness of inferring under the circumstances an intention to incumber one's entire estate. *Montagu* v. *Earl of Sandwich*, 32 Ch. Div. 539.

[19] 1 S. & LeF. 355, 371.

guard. The new remedy, instead of being for the old right, may be for a right very differently conceived. It may be wholly to a new estimate of the right that the new remedy is due. Such appears to have been the fact with reference to specific performance. In a modest remedial garb it was more likely to pass unchallenged than if credentialed from a new kind of right. Many times, and by the highest authority, it has been insinuatingly described not only as a more adequate remedy for a legal right, but as such relief as the law would have given if it could. Yet no one gainsays the historical fact that the courts of common law instead of desiderating this particular phase of the Chancellor's jurisdiction, persistently antagonized it [20] until early in the seventeenth century, when they seem to have struck their colors on this question concurrently with their defeat in their crucial controversy with Lord Ellesmere over the right of the Chancellor to restrain the execution of judgments at law, and with the still sharper discipline to which the King subjected them in the Case of Commendams.[21]

The last stand of the King's Bench against specific performance in equity was made in *Bromage* v. *Genning*, where recourse to the equity jurisdiction was resented and prohibited upon the ground, as stated by so competent a spokesman as Lord Coke, that it "would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease."[22] Thus, in the estimation of the King's Bench, the entire legal force of the vendor's agreement was expended

[20] Y. B. 21 Hen. VII, p. 41. Y. B. 21 Edw. IV, 23 pl. 6. *Wingfield* v. *Littleton*, 2 Dyer 162, a, *Gollew* v. *Bacon*, 1 Bulst. 112. Fry on Specif. Perform. (4th ed.), sec. 36, n. 4.

[21] 1 Collect. Jur., 1–78. 1 Hallam's Const. Hist., ch. vi.

[22] 1 Rolle 368 (1617).

in securing the vendee a right to damages in case of breach, the land not being bound, and its owner being justified in contracting without any idea of legally impairing his control over it.

Although this may sound to modern ears like elevating a processual limitation of the law into a personal right to break one's contract, it will be found upon closer attention to ring as true to the substantive conceptions of the old common law as we would expect in an utterance of Lord Coke.

As bearing upon the intrinsic probability of such an attitude on the part of the old law, it is to be noticed that the idea of judicially compelling the specific performance of agreements is surprisingly slow to develop. In the law of Rome it never advanced beyond stages so rudimentary as to leave it a matter of controversy whether fairly it can be said to have been practised at all.[23] It seems safe to infer, at least, that it never progressed far enough there to be applied to a successor in interest to the vendor in a contract of sale. It is true, no doubt, that under the general law governing processual development, specific performance is representative of a more advanced stage of progress than the recoveries of possessions and of damages that so largely absorb the energies of early law. This is as certain as that preventive remedies are everywhere a later and maturer growth than retributory remedies, and for much the same reasons. But recourse to specific performance of agreements to convey is also very stubbornly impeded by the almost impassable line which it is a characteristic of early substantive law to draw between conveyance and contract. The solemnities of conveyance

[23] 1 Spence Eq. Jur., 461 n. a. and 645. n. c. Fry on Specif. Perform., 3d Am. ed., secs. 5–7, 18.

are well defined and established before contract begins to command much judicial cognizance. The latter, as the later institute, develops independently along lines appropriate to its own functions, which at first are entirely unassociated with the transfer or curtailment of possession or property. Although a contract may relate, in no matter what way, to the disposition of, or to right in, specific property, not being a conveyance it is powerless to bind the property or to invest any one with legal rights in, to, or upon it. Contract in early law does not purport to be an agency available for any such purpose. It is not entered into in contemplation of any such result. In a word, contract as the basis of a claim for damages develops earlier and more easily than contract as a means of binding property. It is perfectly obvious that its inefficiency to bind property is deeper-seated than in any mere inadequacy of procedure. Every tendency or suggestion to enforce such a contract specifically is then subject to discouragement by the fact that to do so would be to confuse two of the law's most fundamental institutes, by transmuting a contract to convey into a potential or incipient conveyance.

It is true that long before the time of Lord Coke, the common law itself, to meet a few extreme exigencies, had made some inroads on the distinction between these two institutes. No provision having been made originally for seisin of anything less than a freehold estate, when tenancies for years came into use they fell beyond the pale of conveyance. It was easier to devise some measure of protection for the tenant through the still plastic law of contract than to reopen the crystalized law of seisin. So, as a substitute for the estate with which he should have been originally, and is now accredited, an exception in his favor was wrought into the

law of contracts, whereby a sealed contract leasing lands for a term of years was conceived to bind the land as against the obligor and those claiming under him, and the writ of covenant was invented to enable him to recover from them the term itself in case they ejected him. The door thus having been opened for the subjection of the land to a peculiar right resting in covenant, the opening was afterwards deemed broad enough to let in a covenant, or as significantly it seems to have been termed, "a grant," to another to levy a fine of lands.[24] When Fitz-Herbert wrote, in the first half of the sixteenth century, it seems that while such a covenant to levy a fine had become real, a covenant to enfeoff another still remained personal. That so the line continued to be drawn for at least nearly a century later is the meaning of the *Bromage* decision. It was not until some time during the century and more that intervened between that case and Blackstone's lectures, that a mere executory covenant to convey an interest in lands came to be regarded at law as a covenant real.[25]

With respect to this common law intensification of a bare personal contract into a real contract originally as a means of working out protection for the termor, probably it would not present itself to the mind of anyone as a mere matter of procedure, or as anything else than a normal unfoldment of substantive doctrine. Palpably it was in response to a deeply rooted popular sense of substantive right and vested interest in the termor that the writ of covenant came forth. This is no less true of its subsequent extensions for the benefit of other covenantees. Equally true is this, even more obviously true if possible, of the common law's various

[24] F. N. B. 146, F.

[25] *Ibid.* 145, A. 3 Bl. Comm. 156.

other devices for gradually breaking down the barrier between conveyance and contract: such as the expedient of imparting to contracts an extra-contractual force by conceiving them as annexed to estates and so running with the land, whereby the covenants of landlord and tenant, and of vendor and vendee, were enabled to outrun the old sphere of personal contract, and take hold of property in the hands of heirs, representatives, and assigns. Equity's still further inroads upon the same barriers were in the nature of an extension of the same movement beyond the limits to which the law was willing to go, and were due primarily to a still more intense appreciation of the force intrinsic in the ethical essence of contract. For while the law, overvaluing its forms, characteristically restricted its tardy concessions to covenants solemnized by the seal appropriate to a conveyance, equity, ignoring forms, insisted upon giving effect to the intention and the consideration whenever and however they could be found.

That the specific enforcement of contracts is more than a mere substitute for some existing but inadequate form of legal redress, is further familiarly evidenced by the variety of situations in which it is accorded, when there is no ground for relief of any kind at law. As in cases of part performance under the statute of frauds; in cases where, on plaintiff's part, there has been only a substantial, not a technically complete performance; in cases where equity enforces, as an executory agreement, a legally inoperative assignment of a chose in action, an expectancy, a possibility, or any after-acquired property, or raises and enforces an agreement to mortgage from a deposit of title deeds as security or from delivery of a mortgage that is legally defective. So where an antenuptial contract collapses at law, through merger of personalities by marriage; where land descends

to an heir without involving liability for damages at law for his breach of the ancestor's contract of sale; and where a covenant void at law because for an excessive term is enforced in equity for the period it might legally have covered. And it will be noticed that in practically all of these instances, not only is the absence of legal remedy due to the absence of legal right, but the right is absent owing to the law being less solicitous than equity to circumvent fraud, to distinguish between formal and substantial performance, or otherwise to subdue formally logical modes of reasoning to the moral necessities of exceptional situations.

Having thus noticed the rise and the untenability of the theory that would refer the entire jurisdiction of equity to its peculiarities of procedure, an attempt will now be made to indicate in outline what actually proved to be equity's range of action as a modifier of substantive law.

There never was a time, even under the earliest or most irresponsible of the ecclesiastical Chancellors, when there was a failure to recognize that there were very comprehensive limitations upon the Chancellor's reformatory powers. Confessedly, as a rule, those powers were exercisable only in situations so exceptional and morally stressful that the supposedly applicable legal rule ought not to be regarded as accurately expressive of a deliberate policy of the law with reference to all the circumstances of the particular case; or when the point was one upon which the law was silent from sheer lethargy or parsimony, or from constricted notions of the normal sphere of legal interference. The general rule undoubtedly was, as variously expressed, that equity could not overrrule "the grounds and principles," or a "fundamental point" or a "maxim" of the law. Its function was always conceived to be principally the

correction of what might be deemed in a sense the unintentional harshness or inadequacy of the law's general rules and methods when applied to exceptional cases.

A second restrictive principle habitually observed, though not often referred to, was that the detriments of confusion that would result from a double standard of right upon a particular subject must be weighed in the balance against the advantages that would flow from the Chancellor's enforcement of a view more equitable than the law's. That in a particular class of cases the erection of a double standard of right might be more confusing than productive of good, was a possibility habitually reckoned with.[26] It was largely upon this score, for example, that even under great occasional incentives to departure, the Chancellors quite faithfully adhered to the rule that as mere matter of interpretation, statutes, conveyances, and contracts must be read alike at law and in equity; although in many cases under exceptional pressure, as we shall see, they did not scruple to bring about by a variety of indirections all the effects of a diverse interpretation.

Such limitations as these, it must be borne in mind, served only to fix approximately points beyond which, even under maximum pressure, equity could not go. They never purported to imply that within the boundary lines thus laid down, it was discretionary with the Chancellor to enter upon any general revision of the law's reasonings. Even within those limits it was only by an extreme moral urgency that he was empowered and aroused.[27]

[26] See for example, Lord Hardwicke in *Wilkie* v. *Holme*, Dick. 165.

[27] It will be found a matter of no little interest, to notice, with respect to equitable principles whose origins are distinctly observable, how generally true it is that their earliest applications by the Chancellor were evoked by forms of injustice that under social conditions then current had become both widely prevalent and acutely afflictive.

As for the theory that supposes the functions of the Chancellor to have been limited to the supply of such common law defects as were referable to inadequacies of procedure, his activities appear on the contrary to have had for their object, very largely if not predominantly, the enforcement of moral refinements to whose observance the substantive common law as yet had not even aspired. At first no doubt the Chancellor's power could not have been otherwise than vaguely conceived. It was slowly that its boundary lines were materialized in practice, and then not by the working out of antecedent formulas, but through a very complex and not very predictable interaction of moral, legal, social, political and even religious forces, all more or less toned by the temperamental qualities of the Chancellors. Yet the tendency and progress toward definition were constant: particular "heads" of equitable relief gradually emerging under the ever-waxing force of precedent, and coming finally to operate by way of exclusion as well as by inclusion, so as to invalidate claims to relief not falling under some established specific "head."

The points at which equitable conceptions essentially substantive in character were brought to bear in supplementation or correction of the law, may be conveniently arranged about as follows, though into sometimes overlapping classes:

(1) With a good deal of freedom when the urgency was great, equity in dealing with transactions assumed to correct the law's relative valuations of form and substance. For "equity regards substance rather than form."

(2) It expanded and refined the law of fraud.

(3) It derived and enforced from mere "relations of confidence" a catalogue of conscientious duties of which the law was unheedful. And having established

uses and trusts, it often, even in the absence of any relation of confidence, would raise them by implication to facilitate the recognition or realization of other equities.

(4) It was principal elaborator of the doctrines of accident and mistake.

(5) It insisted often more sedulously than the law did upon such adjustments and readjustments of burdens and benefits as to secure or maintain their reciprocality; and it regarded with more than legal favor the principle of equality and the principle of lien.

(6) It relieved against the grossly unconscientious use of legal rights, and correlatively in a few instances against their unmerited loss.

(7) It guarded against the oppressive use of the principle of contract by imposing upon it a few equitable limitations, suggested by considerations of public policy.

(8) It was more ingenious than the law to protect the interests of specially dependent or meritorious classes, such as married women, children in relation to their parents, infants in all their relations, prospective heirs, those who were objects of charity, and creditors.

(9) It relieved against some losses that the law ignored as being due to folly, or as being matter of morals beyond the normal pale of law, or as otherwise beneath the law's notice.

There were also two tactical advantages available to the Chancellor, of so much moment that without allowance for them any estimate of his capacity for innovation would be incomplete.

(a) For, by gradual processes of expansion and development such as are incident to the administration of all law and the exercise of every jurisdiction, he ultimately was able, almost everywhere, to carry his innovations further than he would have been likely to venture at

a bound. Of this, perhaps the most striking illustration is the growth of the doctrine of uses and trusts as hereinafter traced.

(b) The Chancellor, in some instances, was able to create new equities by refusing to accord the benefit of old ones except upon the waiver of a legal right. To such a manipulation, for example, the wife was indebted for her equity to a settlement, the Chancellor exacting a settlement as a condition to the grant to the husband of equitable remedies for getting in his wife's estate.

The workings of equity along these several lines will now be looked at somewhat in detail, with a view to noting how far they justify the view here taken of their range or sphere.

CHAPTER VI

EQUITY'S REVALUATIONS OF FORM AND SUBSTANCE

The development of law involves no more constant or fruitful competition than that which arises between considerations of form on the one hand, and those of moral substance on the other, as determinatives of the validity, meaning, and scope of transactions. It was toward the overthrow of the many-sided legal tyrannies of form that very largely the activities of both Praetor and Chancellor were directed. That "equity regards not the form or circumstance, but the substance of the act," was perhaps the most pregnant of the Chancellor's maxims. Not by any means that equity would arrogate a general revision of the law's reasoning where the relative values of form and substance were involved; but that it would assume to correct such of the law's false estimations as in this regard seemed gross enough in character, or grave enough in their resultant injustice, to shock the conscience, and overbalance the inconveniences that, considering the nature of the particular discrepancy, would be likely to flow from a double standard of right, or such as were prejudicial to some special object of equitable favor, such as equality, rights of lien, or the reciprocality of burdens and benefits, or such as for some reason would be but slightly resistant to equitable control.

The subordination of forms to substance is indebted for its primacy among equities mainly to two circum-

stances. It has all the pervasiveness of a distinctive method of reasoning about transactions generally, although a certain degree of moral urgency and exceptionality of conditions are necessary to call it into action in antagonism to the law. Again, if we interpret history with an open mind, it seems impossible to deny that upon this particular subject the Chancellor was less scrupulously observant than upon others of the limitation which barred him from subverting defined and deliberate policies of the law. For not only through inherited proclivity, but upon principle and policy, the law doted on its forms. It teemed with prudential reasons for them, from which undeniably in a multitude of instances the Chancellor ventured to enforce his dissent.

If we review the doctrines of equity to determine how many are fairly referable to the Chancellor's revaluations of form and substance, we shall find the proportion surprisingly large. We must account among them all those doctrines that exhibit in equity a determination to gauge the validity and scope of transactions more largely than the law, by reference to such matters of moral substance as the valuable considerations passing between the parties, the relationships of blood or marriage existing between them, the confidence reposed, the honesty and accuracy of representations made, the freedom or the measurable subjection of the will, the intentions and understandings of the parties whether expressed, impliable in fact, or juridically imputable; and less largely than the law, by reference to forms of expression or of solemnization by word or act; or again, more largely than the law, by reference to the substantial justice of the result, with less concern as to the formal logicalness of the result, or its bearing upon the form of the law with reference to its symmetry, simplicity, or generality.

Within these classes fall almost entirely the distinctively equitable doctrines relative to uses, trusts, and other confidential relations, and to fraud and mistake. These, however, severally assume such proportions as principal heads of equity jurisdiction that they will be reserved for separate consideration. Before going into those specific subjects, an attempt will be made to group enough of the more miscellaneous instances of equity's subordination of form to substance to illustrate how various her activities have been upon that score.

And first as to the several ways in which equity has manifested its higher appreciation of the actual or presumable intentions of the parties to transactions, when vitalized by good or valuable considerations. It has been for a long time, perhaps one should say always, a very general rule that the interpretation of deeds and contracts, no less than of statutes, should be the same in equity as at law. But formerly, probably until the latter half of the eighteenth century, the rule was considerably more flexible than it is now. Among the many evidences of this may be noticed the understanding of Lord Holt, who, sitting in Chancery in *Bath and Montague's* case in 1693, said: "The rule of law is *benignae sunt interpretationes chartarum;* and I suppose there ought to be a great deal more indulgent interpretation of them in equity, to maintain the intention of the parties." [1] The only fault with this supposition seems to have been its failure to note that it was within but narrow limits, and as a rule perhaps only in aid of distinctively equitable doctrines, that equity would presume to deduce and vindicate intention adversely to the law.

[1] 3 Ch. Cas. at p. 102.

However general may have been equity's conformity to law in construing transactions, we must not ascribe it to any supposed harmony of bent or method in the two systems. It was mainly because this was one of the subjects upon which, to avoid undue confusion, it was deemed necessary that as a very general rule equity should follow the law. It should pass unchallenged as a truism that while our old common law was as excessively formalistic and as deaf to intentions not clearly expressed as would be expected in an undeveloped law, the Chancellors from the beginning were in sympathy with the methods of deriving, elaborating, and exalting intention in furtherance of justice that had been developed with rare skill by the classical jurists of Rome, and ventured to resort to them under a variety of exceptional conditions. It would be a gross miscalculation also, to suppose that the leanings of the Chancellor toward these maturer and more searching methods of interpretation took effect only through occasional avowed departures from common law modes of reasoning. His constant tendency was to liberalize his reasoning even when he was purporting to follow the common law and when therefore there would attach to his construction much of the force of a common law precedent, the small gaps thus opened being as a rule speedily closed up by acceptance in the law courts of the Chancellor's slightly liberalized reasoning.[2] Nothing is risked in estimating that such has been the history of a very substantial percentage of the many refinements that so broadly distinguish our interpretative methods of to-day from those of five centuries ago.

A conspicuous instance of equity's refusal to follow the law upon a point of interpretation was that which

[2] See 1 Spence Eq. Jur., 517, 518, and note e.

gave rise to the doctrine of equitable waste. Where a tenant for life of land was licensed in general terms to commit waste, as where he was to hold "without impeachment of waste," the license was construed at common law as being unlimited in extent. It is the familiar doctrine of equity, having its inception as far back as the time of Elizabeth and known as the doctrine of equitable waste, that the general language of such a license is not sufficient to justify certain abusive forms of waste, such as the tearing down of a house from motives of spite to the remainderman,[3] the destruction of ornamental trees,[4] and now in some jurisdictions the removal of even common timber under conditions recklessly prejudicial to the remainderman's interests. That it is a case of diverse interpretations is generally agreed. A court of equity controls the exercise of the power "with reference to the presumed intention of the party creating it, and not to any fancied notions of its own."[5] "It comes back to this, that the grantor of the power intends it to be used fairly."[6] The point is as to how it came about that in this instance equity declined to follow the legal construction, and assumed to enforce an intention which was not perceptible to the law. The discrepancy was explained by Professor Langdell as not due to the introduction by the Chancellor of any equitable principle, but as denoting only an error by one court or the other in the application of legal methods of interpretation[7]; which would seem to reduce to sheer contumacy the persistence of the Chancellor in award-

[3] *Vane* v. *Barnard*, 2 Vern. 738; 1 Salk. 161.

[4] *Packington's case*, 3 Atk. 215.

[5] *Marker* v. *Marker*, 9 Hare at p. 17; *Micklethwait* v. *Same*, 1 DeG. & J. at p. 524.

[6] *Baker* v. *Sebright*, 13 Ch. Div. at p. 186.

[7] Brief Survey of Eq. Jur., 5, 251–2.

ing compensation for such abusive waste, professedly upon legal grounds that were disavowed by courts of law. The cases show unmistakably that the two equitable principles to whose co-operation we are indebted for this humane departure from the law, are the limitation upon the unconscientious use of legal rights, and the subordination of form to substance or spirit as a guide to intention.[8] The only doubt, if any, is as to the exact manner in which the two principles combined to bring about the result. The most satisfactory account of that matter appears to be, that malicious and reckless waste seemed to equity so essentially unconscientious, that the Chancellor would not suffer relief against it to be foreclosed by the common law's construction that even such waste had been agreed to by the parties; and that, applying its own methods of interpretation — attaching less significance to the verbal form of the license and more to implications arising from the nature of the relation in which the parties stood toward each other — equity held that there had been in fact no intention to authorize such waste. It is noticeable, however, that in the similar dilemma presented by bonds for the resignation of livings, equity, without troubling itself to reinterpret the bonds, restrained as unconscientious certain oppressive uses of them, notwithstanding that according to the legal construction of the bonds such uses had been assented to.[9] But again, where an executor had given a bond to secure payment of a legacy, equity would permit "it to be made use of" no further than to the value of the

[8] *Aston* v. *Aston*, 1 Ves. 264, 265; *Turner* v. *Wright*, 2 DeG. F. & J. 234, 241–7.

[9] Lord Hardwicke in *Grey* v. *Hesketh*, Ambl. 268; Newland on Contracts, 321 and cases.

estate after accidental losses by fire or from other causes: planting itself evidently upon both grounds, *i.e.*, upon its right to restrain the unjust use of legal rights, and on its reinterpretation of the bond as designed to secure a performance, but not an enlargement, of the executor's duty.[10] Probably in all such cases it is reinterpretation, whether avowed or not, that lies at the root of the decision.

It was a similar dissent from a legal interpretation that led to the equitable rule against illusory appointments. A power of appointing property amongst a specified class of persons was construed at law to carry, to the donee of the power, an unlimited discretion as to the proportions to be appointed to the several beneficiaries. Equity not only refused to follow this construction, but even where the proportions were expressly referred to the discretion of the donee of the power, held, at first, that the shares appointed must be equal except as there were good reasons for inequality, and held finally that although strict equality was unnecessary, each member of the class must receive a substantial and not merely a formal, nominal, or illusory share. These equitable limitations upon the discretion were evidently the result of a more penetrating view of the donor's intention, which was looked upon as responsive primarily to some moral relation to the donor which was common to all the members of the class, the discretion being interpreted as conferred not to authorize the practical ignorement, in the case of any member of the class, of the relation that inspired the gift, but that so far as not inconsistent with the main intention reasonable allowances might be made for distinguishing circumstances unforeseeable by the donor. The

[10] *Holt* v. *Holt*, 1 Cas. in Ch. 190.

distinction thus drawn by equity has not met with universal favor, and in some jurisdictions has been rejected: mainly, however, owing to the practical difficulty in locating the line between a substantial and an illusory share. If we query why it was that in this instance equity, contrary to its general rule, presumed to substitute its own more subtle methods of pursuing intention for those of the law, clues may be found in the fact that the promotion of equality, and the prevention of the palming off of the formal or nominal for the substantial, have always been accounted among equity's legitimate functions.

One of equity's methods of working out the supremacy of substance through processes of interpretation was to discriminate more fruitfully than the law between the grand or substantial intention of the parties to a transaction, and their minor and modal intentions, subordinating the latter to the former. The theory of relief against penalties and forfeitures is a good example. In the earliest cases, the relief was afforded upon the principle of accident, the temporary fault being found due to some mishap for which the defaulting party was not to blame. Later, when the default was trivial, even though negligent, it was sometimes relieved against on account of its unsubstantial character. Sureties were sometimes relieved also, owing to the special favor with which they were regarded.[11] A broader ground than these had to be found before the relief could assume anything like its modern proportions. The exigency was great, for society was bleeding and groaning beneath the double bond, the strict mortgage forfeiture, and an elaborate mechanism of miscellaneous penalties and forfeitures that greed and cruelty had been per-

[11] 1 Spence Eq. Jur., 602–3.

mitted to devise and enforce. Before the end of the seventeenth century, at any rate, it began to be appreciated that the most available expedient for broadening the scope of relief was an equitable reinterpretation of the oppressive documents, which would account it contrary to the true intention of the parties that the penalty or forfeiture should operate otherwise than as security for the damages actually suffered through the default, when the extent of such damages was fairly determinable. As the doctrine was finally settled, it has been that where in the view of equity a penalty is inserted merely to secure a collateral object, such as the payment of money, "the enjoyment of the object is considered the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damages really incurred." [12] "The true ground of relief against penalties is, from the original intent of the case, where the penalty is designed only to secure money, and the court gives the party all that he expects or desired." [13]

What equity did in this connection was to take the two clauses which in the estimation of the law were of equal dignity and force, viz. the clause defining the principal obligation, and that defining the penalty or forfeiture for non-performance, and reduce the latter to a distinctly inferior position of mere subservience to the former, toward which, as being of the substance, the cl use for penalty or forfeiture was construed to stand in the relation only of a means to an end.[14] This method of

[12] Lord Thurlow in *Sloman* v. *Walter*, 1 Bro. Ch. 418.

[13] Lord Macclesfield, in *Peachy* v. *Duke of Somerset*, 1 Stra. 447.

[14] In one of its features, relief from penalties and forfeitures bears a strong family resemblance to that afforded by equity, as already noticed, against wanton exercises of an unrestricted license to waste. In both cases, equity in dealing with what it deemed an essentially

interpretation would have had little permanent value had it been permissible to defeat it by incorporating in the documents express declarations of a contrary intent. Such declarations were therefore held futile, upon the principle, no doubt, that the intention to utilize the penalty or forfeiture as security only was conclusively evidenced by the fact that it was conditioned to accrue only upon default, and that to this original, grand, and equitably predominant intention all incompatible minor or modal intentions, however definitely entertained, must give way.

The familiar development that the subject underwent in connection with the law of mortgages justly ranks as one of the most notable in the history of equity, ultimating as it did in a conception of the mortgage transaction radically divergent as well from the language of the parties — the form of the instrument — as from the common law theory of its nature. For while in form and in legal theory the mortgage was generally an absolute conveyance of the legal title, subject only to a proviso for re-entry or reconveyance in case of the prompt performance of the principal obligation, in equity's final estimation it was productive only of a lien, the mortgagor being regarded as remaining, until foreclosure, the owner of the land. The stages of this development seem less distinctly marked in the decisions than one might have expected to find them, considering that they all fall within the seventeenth and eighteenth centuries. But whatever may be the true version of them, they by common consent exhibit a most signal and equitable triumph of the moral

unconscientious use of a legal right, was handicapped by the legal construction that such use had been agreed to by the parties, and in both cases it freed itself by inferring, through equitable modes of reasoning, that such was not a true view of the mutual intention.

substance or essential nature of the transaction as a security, over its verbal form as a conveyance upon a condition subsequent.

Another instance of equitable discrimination between intentions, with reference to their relative degrees of substantiality, is seen in the Chancellor's construction of the clauses so common in English wills subjecting legacies to a condition that the legatee shall not marry before a certain reasonable age, or without the consent of a person or persons named. If the gift was of land or of money charged on land, equity followed the law in construing the condition strictly according to its terms. If only personalty was involved, equity, taking to itself a latitude from the fact that administrat on of the personalty of decedents had come into Chancery from the ecclesiastical tribunals and not from those of the common law, assumed to enforce its own view of the testator's meaning, which was that at least where the condition was subsequent and the legacy was not bequeathed over to someone else in case of its forfeiture, the condition was only a means to the end of guarding against an improvident or unequal marriage, and operated *in terrorem* only, without actually working a forfeiture.[15] Here, as in the

[15] Eq. Cas. Abr., chap. 17, C; *Hervey* v. *Aston*, Cas. Temp. Talb. 212, and note; *Scott* v. *Tyler*, 2 Bro. Ch. 431. This view of the matter seems sound in principle, where in fact the marriage is not an objecttionable one, and in such case is a view thoroughly characteristic of equity, as giving effect to the grand intent in opposition to the words. For, as justly remarked by Lord Kames, as the conditio is a means to an end, his will with regard to the end should prevail over his will with regard to the means. The means are of no significance but as productive of the end, and if the end can be accomplished without them they can have no weight in equity or in common sense. However, it is not the validity of the equitable view in any of these cases with which we are here mainly concerned. The point to be noted is the fact of equity's departure from common

case of illusory appointments, we see equity overruling the very words of the document, in its extra-legal solicitude not to disappoint unnecessarily the claims of blood or friendship to which the gift was responsive, and which were of the moral substance of the transaction.

In the same category may be placed the cases in which, respecting these conditions against marriage without consent, it has been held in equity that an oral or even a tacit consent to the marriage is good enough, although the condition is that the consent shall be in writing, and although the circumstances are not such as to make the condition operative *in terrorem* only.[16] To equity, the writing seemed only a formal and not indispensable mode of verifying the assent, which was the substantial thing which it was the principal intention to insure. Here once more what we see is the moral force inherent in underlying relations and mental states, set free by equity, whether wisely or unwisely, from legal manacles of form.

It was also mainly in the pursuit of its discrimination between grand or general, and modal or particular intention, that equity developed, in the construction of wills, the doctrine that where the intention of the testator can not be fully or exactly realized, it must be given effect *cy-près*, or as nearly as may be. Very generally the operation of that doctrine was to give effect to a general or grand intention or to the substantial and paramount

law methods of reasoning. That occasionally equity's refinements on the subject of intention were carried to a questionable extreme, is undeniable.

[16] 2 Mod. at p. 310. So where one had power to charge land with a certain sum, by deed or will under seal, and had caused a deed for the charge to be prepared and engrossed which he died without executing, it was held a good charge in equity. Eq. Cas. Abr. C. 44, B, sec. 14.

object of the testator, although in a manner or a degree different from that for which the testator had made provision; his particular manner or degree appearing to be impracticable on account of its illegality or otherwise. As for instance where a bequest in trust for the relief of slaves, under a slavery which afterwards ceased to exist, was held applicable to the benefit of the freedmen, or to other purposes resembling *cy-près* the charities to which the testator had shown a disposition by the clause in question or by other clauses in his will,[17] so that the fund "might fulfill in substance, if not in form, the purpose of its consecration." [18]

So, to take an illustration of a very different type, where there was power to appoint to a child, and appointment was unwarrantably made by will to the child for life with remainder to his children, the grand intention was realized approximately, though not in form, by construing the appointment as productive of an estate tail.[19] A review here of the detailed applications of the principle *cy-près* would be unprofitable, especially as their significance for our purposes is reduced by the fact that they relate mainly to the construction of wills, a subject upon which generally equitable methods of reasoning have been adopted by the law. The common law's traditional mode of accounting for its exceptional liberality in the construction of wills is to ascribe it to the peculiar conditions under which wills are often executed — the extremities of impending death, and the absence of legal advisers. By very general consent the true

[17] *Atty. Gen.* v. *Ironmongers Co.*, 2 Beav. 313; and 10 Cl. and Fin. 908; *Jackson* v. *Phillips*, 14 Allen 556.

[18] *The Late Corporation, etc.* v. *U. S.*, 136 U. S. 1, 61.

[19] *Pitt* v. *Jackson*, 2 Bro. C. C. 51; *Griffith* v. *Harrison*, 3 Bro. C. C. 410; *Smith* v. *Lord Camelford*, 2 Ves. Jr. 711; and see *Humberston* v. *Humberston*, 1 P. W. 332, *Vanderplank* v. *King*, 3 Hare 11, 12.

account of the matter is, that long before wills were first brought within range of common law courts by the legislation of Henry VIII, so enlarging the power to will as to include legal interest in land, the spirit and methods in and by which the intentions of a testator should be pursued had become defined and established in the ecclesiastical courts and in Chancery in their administration of testaments of personalty and of uses. Those methods, as the settled law of the land in the construction of testaments, the common law courts could hardly do otherwise than adopt, when afterwards called upon to interpret wills. However this may be, the pursuit of intentions *cy-près* — the principle of realizing the substance, or a part, of intentions that cannot be fully or formally effectuated, by "letting the intent work as far as it can," and of exalting the general or substantive intent over the modal or formal — seems unmistakably equitable in origin and character. Instances are not wanting in which, in dealing with other instruments than wills, equity assumed to enforce the principle in opposition to the common law. Some occur in connection with articles for a settlement, with which class of documents, upon grounds hereafter to be noticed, equity ventured to take several special liberties.

As representative of another class of such instances may be cited the case of a power to lease for a given number of years. At law a lease for a greater number of years will be void, while in equity it will be void only as to the excess,[20] in order that intention may be carried out as nearly as may be.[21] Cases of this kind illustrate

[20] *Roe dem. Brune* v. *Prideaux*, 10 East 186–8; *Hervey* v. *Hervey*, 1 Atk. 569; *Powcey* v. *Bowen*, 1 Ch. Cas. 23.

[21] *Leake* v. *Robinson*, 2 Meriv. at p. 379; *Robinson* v. *Hardcastle*, 2 T. R. at p. 254.

that equity's discrimination in favor of the grand, principal, or general intent at the expense of a particular or modal intent, is only one phase of the broader equitable disposition to effectuate fragmentarily many intentions which, by the law, were abandoned as abortive, because incapable of complete and formal realization.

Another interpretative method that has sometimes led equity to recognize considerations of moral substance which were not reckoned with by the law, because not covered by the particular forms of expression employed in the transaction, was to indulge more freely than the law in presumptions of intent arising from and appropriate to the general nature of the relation entered into and its attendant circumstances, including the presumption that the parties contemplated a transaction that would be reasonably effective.[22] The manner in

[22] In 2 Coll. Jur. at pp. 271–2, are the following remarks which seem so admirably illustrative of one of equity's methods of dealing with matters of intent as to merit quotation. The question being whether, when a term is in other respects properly circumstanced for attendance on the inheritance, a declaration is necessary of an intention that it should be so, it is said:

"Now here we may observe, that if the protection of real estates, or the keeping real property in its right channel, and the preserving the dominion of it entire, were not desirable ends, and such as appear intimately connected with some *general convenience*, the attainment of them would be no object of a court of equity, nor would they have operated in that court as a motive for the introduction of terms to attend the inheritance; which Lord Hardwicke, as I observed before, ascribes to them. But if these ends were convenient and desirable, which, I think, is very unquestionable (see the attention paid to them by our court of equity), it is but reasonable to presume every owner of real property to have them in his intention and wish, unless he declares the contrary; the utility of these ends *remains the same, whether a man expresses his intent to attain them or not;* and therefore, for anything that appears to the

which, in England and in a few of our states, equity has interpreted a deposit of title deeds as security, is a good example. At common law such a deposit was interpreted as only a pledge of the deeds, carrying no right in or upon the property, although clogging the owner in its disposition. The reasoning of equity has been that the parties could have had no other end in view than in some way to secure the debt upon the land, and that the normal and just form of such security being by way of mortgage, an intention and agreement to mortgage should be presumed or inferred. That the equitable remedy of specific performance was an important factor in the administration of this view, is to be conceded. It seems equally certain that equity was led to construe the transaction as it did, not at all as a logical sequence of the power to compel the specific performance of agreements, but by its above-noted inclination, sometimes indulged even to the point of improvidence, to consider moral substance rather than points of legal form or expression, and to subject the intentions of the parties to a transaction to such processes of construction and presumption that as nearly as practicable they may be found commensurate with the moral proprieties of the particular relation, and may be effective in character. The account of the doctrine given by Lord Loughborough at about the time of its establishment, was that the deposit of the deeds is, in equity's estimation, "*a delivery of the title* to the Plaintiff for a valuable consideration": and that "the

contrary, the *general ground* upon which equity considers terms as attendant on the inheritance *subsists in one case as well as the other.* Indeed, as far as the intention or assent of the owner is requisite to effect or complete such attendancy, it is but equitable to infer it from his silence; for it would be injurious to impute to any man a want of assent or inclination to what generally appears to be convenient and desirable, unless he expresses it himself."

court has nothing to do but to supply the legal formalities." [23]

A different yet kindred exhibition of equity's disposition to foster the effectiveness of transactions is noticeable in its attitude toward defective instruments for the execution of powers or for the transfer of copyholds; concerning which, for special reasons, equity was more free to follow its own methods of reasoning than in connection with conveyance generally. It therefore implied in such cases an obligation to make good any defects by which the legal efficiency of such instruments might be impaired. As said by Lord Redesdale in speaking of instruments of that kind, "where a person contracts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he has power to make it." [24] "Whenever," said Lord Alvanly, "a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations shows an intention to execute such power, the court will operate upon the conscience of the heir to make him perfect this intention." [25]

Of similar nature was equity's method of dealing with a legally defective mortgage. Instead of abandoning it as simply nugatory, as the law did, equity, with characteristic anxiety to effectuate intention despite discrepancies of form, will construe the defective mortgage either as an executory contract for a mortgage or as proof of

[23] *Russell* v. *Russell*, 1 Bro. C. C. 269; and see *Dale* v. *Smithwick*, 2 Vern. 151.

[24] *Blake* v. *Marnell*, 2 Ball & Beatty 44. "We should notice that it is not necessary there should be a covenant or an express contract. It is binding upon the conscience to do what was meant to be done." *Varick* v. *Edwards*, Hoffman's Ch. at p. 393.

[25] *Chapman* v. *Gibson*, 3 Bro. Ch. 229.

an anterior or underlying contract of that kind — another case in which the peculiar ethics of equity supplied the motive as obviously as its peculiar process did the means.

So it was also, that where the law could see only an abortive attempt to assign or convey some legally unsalable thing, such as a chose in action, an expectancy, a possibility, or the like, equity would presume or infer executory agreements to assign or convey, through which ultimately the intentions of the parties could be worked out. And so the familiar rule that in furtherance of the intention equity would maximize the efficacy of an order to pay money out of a particular fund, by construing it as *pro tanto* an assignment of the fund.

In this general connection equity's departure from the law in the construction of articles for marriage settlements is of exceptional interest. There was perhaps no subject upon which equity professed itself more strictly bound to follow the law than in the construction of words limiting estates in land. The legal interpretation must as a rule be followed not only when such words were used in limitation of a legal estate but very generally when used in limitation of a use or trust. This submissiveness of equity was, however, somewhat overtaxed in dealing with articles for a settlement. It was not uncommon apparently for deeds of marriage settlement to convey land to trustees for the use of husband or wife for life, with remainder in fee to the heirs of his or her body. The old feudal rule in Shelley's case required that this should be construed as clothing the husband or wife with an equitable estate in fee tail with power in the father to cut off the issue of the marriage by alienation of the land. For by that rule persons referred to merely as "heirs," in a deed conveying to their ancestor a freehold estate, could not take otherwise

than by descent, the word "heirs," so used, serving only to fix the extent of the interest taken by the ancestor.

From this view equity in the construction of deeds of marriage settlement did not ordinarily assume to dissent, even when the settled estates were equitable. It seems also to have acquiesced in the legal view that the technical rule was applicable generally not only to deeds but to executory contracts. It nevertheless refused to be bound by the rule, in construing and enforcing executory articles for a marriage settlement. To enable itself thus to protect the issue of the marriage in such cases at a minimum expense of encroachment on the rule of law, it accredited the articles with an exaggerated degree of informality — likening them to the rough headings for an agreement in which complete definitive limitations would not be expected, and as to which the legal rule should not be recognized as fixing more than the *prima facie* meaning of the expression.[26] Having thus opened the door to its own interpretation, it was reasoned by equity, quite characteristically, that in case of articles for a settlement of the type above instanced there arose from the relations of the parties and the general nature of the instrument, presumptions of an intention to protect the children by investing them with interests as remaindermen, which were strong enough to overbear the contrary legal interpretation. In violation of the common law meaning of such articles, equity would therefore specifically enforce them by way of a deed of strict settlement, wherein the children would be described otherwise than as "heirs," with the effect of withdrawing their interests from the operations of the feudal rule. If marriage articles providing as

[26] *Randall* v. *Willis*, 5 Ves. 262; *Taggart* v. *Taggart*, 1 Sch. and Lefr. 87.

above suggested for a trust estate to the parent for life, with remainder in fee to the heirs of his or her body, were followed after marriage by a deed of settlement in like form, equity would reform the deed as having been so worded by mistake, and would make it so read as to conform to the equitable interpretation of the articles. And so it would do in case of a deed following such articles even before marriage, when the deed purported to be made in pursuance, rather than in modification, of the articles.

A similar principle was acted upon in the case of executory trusts under wills. Where by will there was not actually created, but was directed to be created, a trust in land in favor of a person for life with remainder to the heirs of his or her body, the law's feudal interpretation was accorded in equity only *prima facie* force as in the case of marriage articles. But as it was not considered that in case of a will there was the strong presumption of intent to safeguard the interests of the issue that there was in the case of marriage articles, other affirmative evidences of such intent must be found in the will in order to justify the ascription of a different meaning than the law's.[27]

These rulings illustrate perfectly the contrast between legal and equitable tendencies in interpretation, referred to in the old saying that "at law the legal operation controls the intent, but in equity the intent controls the legal operation of the deed." [28] The saying has reference

[27] The cases upon these several points will be found collected in 2 Story's Eq. Jur., chap. 25, and in Jickings' Analogy, 34–7. There were other points also upon which, in the interpretation of marriage articles, equity departed avowedly from the common law, as by Lord Hardwicke in *Hineage* v. *Hunlocke*, 2 Atk. 455.

[28] Sir Thomas Clarke in *Burgess* v. *Wheate*, 1 Eden at p. 198; Co. Litt. 314b, 20b; Wingate's Maxims of Reason, 16. The tendency

to equity's attitude when, because equitable interests are involved, or because the conditions are otherwise such that the following of the legal method of interpretation is not deemed imperative, equity deems itself at liberty to reason in its own way.

Another and equally apt illustration is the decision of Lord Nottingham in *Nurse* v. *Yerworth*, where a posthumous child had been disinherited of all legal interests by his father's devise of his entire estate to the "heirs of my body begotten and to be begotten": words which confessedly did not describe with the precision or formality required by law one who at the *father's* death was an infant *en ventre sa mère*. The question was whether the disherison extended to the equitable interest of the father in a satisfied long term of years. That it did was argued upon the three grounds that equity would follow the law in its construction of the devise, that in any event the term if outstanding must have passed with the inheritance as being equitably attendant upon it, and that in fact the term had been merged in the fee by a conjunction of their ownerships.

of the law to formalize transactions by requiring a high degree of certainty in expression, and sometimes by refusing to accept any other than a prescribed word for the expression of a particular meaning, is well brought out by Mr. Wigmore in sec. 2462 of vol. 4 of his work on Evidence. Equity in her own methods of reasoning has never exhibited the faintest trace of such a tendency. All of the doubtful extremities of interpretation to which she has gone are in a direction the opposite of this, as we are having occasion to notice. For while our early law was very imperfectly appreciative that will and consensuality are the essence and operative principle of transactions, the idea was one with which equity was thoroughly if not extravagantly imbued. Down to the advent of the action of assumpsit, the intentions legally dealt with were almost exclusively such as were attested by "certain and sensible words which are agreeable and consonant to rules of law."

The Chancellor, being satisfied as well from the wording of the devise as by the presumptions arising from the relations of the parties that it was the intention of the father to include all his children, refused to apply to equitable interests the law's exacting standards of form and certainty, and held that as to such interests the posthumous child must be deemed included among the devisees. He held also that the doctrine of the attendancy of terms upon the inheritance, invented by equity to promote justice, would not be applied in prejudice of the posthumous child; for whose protection also the term, though merged at law, would be treated in equity as still subsisting.[29]

So, although the law exacts the use of the word "heirs" as an indispensable condition to the conveyance of an estate of inheritance, equity will dispense with it in the conveyance of an equitable estate, if from the entire instrument an intention to convey a fee interest fairly appears.[30]

And though by law a conveyance of real or personal property to two or more persons must be construed to create a joint tenancy with right of survivorship unless the contrary is expressed, there are circumstances under which, even where legal interests are involved, equity will presume an intention, though unexpressed, that the

[29] 3 Swanst. 608. This solicitude of equity for the interests of the after-born child calls to mind the invalidation of a will by the subsequent marriage of the testator followed by the birth of a child, upon the presumption that under such circumstances the testator would so intend. That too was a rule introduced by equity in the construction of testaments, *Overbury* v. *Overbury*, 2 Show. 242; *Emerson* v. *Boville*, 1 Phillimore 342, which nearly a century later was followed at law by Lord Mansfield in order to harmonize the two systems. *Christopher* v. *Christopher*, 4 Burr. 2171.

[30] *In re Tringham*, 1904, 2 Ch. 487.

tenancy shall be in common or that the right of survivorship shall not obtain. As where the conveyance is for a consideration to which the several grantees contribute unequally [31]; or where the conveyance is of an equity of redemption, to mortgagees who were tenants in common of the mortgage.[32]

To the unexpressed intention thus derived, equity gave effect by permitting the survivorship, and then charging the survivor as trustee for the heirs or devisees of his deceased cotenant. In the case of a mortgage to several to secure a loan, even where their contributions to the loan were equal, assimilating the transaction to one in course of trade, it presumed the parties to have intended that there should be no survivorship, and upon that score charged the survivor as trustee for the personal representatives of the deceased to the extent of his share.[33]

The influences under which the common law rule governing such cases as these had grown hard and fast, were partly feudal; but the law's excessive bias in favor of simplicity in its own form or structure and in favor of a verbal completeness in transactions were also factors. "As the law," said Lord Holt [34] in this connection, "does not love fractions of estates, so neither does it encourage division of tenures or multiplication of services." The principal factors in these equitable qualifications of the common law rule were, first, equity's general repugnance to the principle of survivorship "as working an inequality in point of right and justice," [35] and as impairing the normal reciprocity of the burdens and benefits of

[31] *Rigden* v. *Vallier*, 3 Atk. 735; *Morley* v. *Bird*, 3 Ves. 630.

[32] *Edwards* v. *Fashion*, Prec. Chanc. 332; *Aveling* v. *Knipe*, 19 Ves. 444.

[33] *Petty* v. *Styward*, 1 Ch. Rep. 57; *Morley* v. *Bird*, 3 Ves. 630.

[34] *Fisher* v. *Wigg*, 1 P. W. 14, 21.

[35] 2 Story's Eq. Jur., sec. 1206, note 2 (13th ed.).

ownership; secondly, its quest of intention beyond the wording of the instrument and in all the attending circumstances; and thirdly, the availability of a trust as an unquestionable agency for neutralizing the law.

It is indeed observable that in most, though not in all, of the foregoing instances of the equitable undoing of a legal interpretation, the reversal of result has been brought about not by contradicting the law as to the meaning of the contract or conveyance, but by utilizing, as the basis of an implied trust, some intention divined by equity in the transaction though not disclosed with such formality or precision as to be cognizable by the law. This however does not signify an equitable supposition that in the nature of things there is any reason why an obligation based upon a finding of intention should be raised by evidences of intention any less distinct when enforceable through the agency of a trust than when enforceable by other means. Seemingly there is no reason to doubt that but for its general obligation to follow the law, equity would have brought to bear directly and habitually, in the interpretation of contracts and conveyances, methods of deriving intentions presumptively from circumstances and relations akin to those which she so often employed in raising trusts, upon the inference that certain intentions though unexpressed had been actually entertained. The policy of equity in acquiescing in a common law construction, and then neutralizing it by charging the beneficiary of it as trustee upon the strength of intentions which equity could discern though not sufficiently expressed to claim legal recognition, served in two ways to facilitate the equitable interposition. It reduced the form of equity's resistance from a contradiction of the law to a counteraction of it, and it gave equity the tactical advantage that the liberty to derive intention by its

own methods was somewhat greater where the question was as to existence of a trust — an institute of its own creation — than where intention was to be sought for other purposes.

The ultimate utilization of the principle of the implied and constructive trust in reinforcement of all equities that it was found capable of subserving, will be noticed in the chapter on trusts. In no direction perhaps has it been more largely thus employed than in giving effect to intentions not verified with legal certitude or formality; the intention thus enforced being generally not to create a trust, but to bring about some result to the realization of which it can be seen that a trust would contribute.

In a number of instances equity seems to have put forth, as resting upon intention unappreciable or ineffectual at law, doctrines which came ultimately to be recognized as based upon some other equity. Such for example was the case with the more interesting phase of the doctrine of election: the doctrine defining the rights of a grantee or devisee of property when the same instrument that constitutes him such undertakes to pass to another person other property of which he himself proves to be the owner. When viewed in the light of old common law methods of reasoning, there is no mistaking the distinctly equitable coloring of even that part of the doctrine which forbids him to keep both properties, and compels him to elect to which of them he will lay claim, upon the ground that he must either accept or reject in their entirety the provisions of the deed or will, and cannot take its benefits without its burdens. The two rights would not, to the common law, have seemed repugnant.[36]

[36] See on this subject the luminous note of Mr. Swanston to *Gretton* v. *Howard*, 1 Swanst. 425.

The second and more noteworthy phase of the doctrine, however, and that with which we are just now concerned, is that which, upon an election by the grantee or devisee in question to retain his own property, awards to the other grantee or devisee, whose expectations are thereby disappointed, the property which by the terms of the instrument was to have gone to the former, or so much of it as will compensate the latter for his loss. Both phases of the doctrine were long held merely declaratory of what equity conceived to be the intention of the testator or grantor.[37] This was satisfactory so long as the doctrine in its second phase was applied, as originally it was, only to a testator who knew that he was including in his dispositions property that was not his own. It ceased to be satisfactory when the rule was held applicable even in the absence of such knowledge. The utmost that could be claimed in such a case was that, although the substitution of properties dictated by equity could not have been contemplated by the testator, it was in fulfillment *cy-près* of the different intention which he did entertain. Finally, however, it has been recognized by the House of Lords in *Cooper* v. *Cooper*[38] "that the extension of the rule to cases where both properties were supposed by the testator to be his own disproves the theory that the rule rests on intention." All the four opinions delivered concur in substance in denying that the rule proceeds "either on expressed intention or upon a conjecture of a presumed intention," and in declaring it "a rule of equity founded on the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present

[37] Sir William Grant, M.R., in *Welby* v. *Welby*, 2 Ves. & Bea. 191.

[38] L. R. 7 H. L. 53, 78.

to the mind of the party making the will!" Notwithstanding the singular unanimity with which the Law Lords refrained from indicating under what "head" of equity it is that relief is afforded in such cases, there seems to be no doubt about the soundness of this greatly belated view. It seems fairly subsumable under the equitable maxim that the person or fund bearing the loss should reap the benefit, that being, as elsewhere noted, one of the principles which avowedly equity has carried further than the law.

Passing along to that phase of the law's undue susceptibility to matters of form which consists of an excessive concern about the logicalness of its rules and correlative unconcern as to their justice, a conspicuous instance of it which equity undertook to correct is to be seen in the rule respecting the merger of estates and charges.

As the provisions made by law for splitting ownership into fragmentary estates, in possession, remainder, and reversion, for their subjection to liens and charges, and for the carving out of terms for years to be held as chattel interests, were designed to permit the distribution of these partial interests among different persons when the exigencies of business might so require, it seems at first blush self-evident that where a charge and the estate on which it rests, or a lesser and greater estate in the same property, come to be united in the same person, in the same right without intervening estate or charge, the charge or the lesser estate, as the case may be, must merge back into the larger estate from which for convenience sake it had in a sense been temporarily subtracted. In the eye of the law, this result was logically too necessary to be much qualified even when working injustice. In the estimation of the Chancellors there was a moral necessity for forcing exceptions

upon the rule in certain extremities. Their methods of aggression upon it are fairly legible in the reports, and are of enough interest to be worth tracing through the salient cases.

In *Nurse* v. *Yerworth*,[39] which perhaps is the earliest case, Lord Nottingham, as noticed a few pages back in another connection, refused to recognize the merger of an outstanding satisfied term of years, in order to save to a posthumous child his interest therein, of which, if the merger were allowed, he would have been unjustly deprived by a highly technical rule of law.

In *Danby* v. *Danby*,[40] decided by Lord Nottingham in 1675, the underlying fee had been collusively procured to be conveyed to the holder of a three-thousand-year term on purpose to drown his term and so hinder him in making provision for his younger children. The conveyance was held fraudulent, and its use as evidence or otherwise forbidden.

In *Saunders* v. *Bournford*,[41] decided by the same Chancellor in 1679, a long outstanding term for years had been conveyed by its owner, upon certain trusts, to two trustees, one of whom by inheritance had become owner of the underlying fee. It having been held at law that a moiety of the term had thereupon merged in the moiety of the fee, it was argued that to that extent the subject of the trust, *i.e.* the term of years, had ceased to exist, leaving the *cestui que trust* remediless as to that moiety, even in equity. But the latter's equity was held unaffected by the legal merger. Although in thus gripping the property despite the merger the Chancellor seems only to have reiterated the principle upon which originally he pursued trust property in the hands

[39] 3 Swanst. 608.

[40] Finch, 220.

[41] Finch, 424.

of the feoffee despite the legal force of the latter's seisin, and upon which he followed it through all changes of form, it no doubt tended to mark the legal doctrine of merger as not invulnerable to equitable attack.[42]

A decade later, in *Powell* v. *Morgan*,[43] one in whose hands a term had merged at law had devised it to creditors as though still subsisting. The question arose whether the Chancellor would permit a chattel interest, liable to the claims of creditors, to be by merger swept away and absorbed to their prejudice and against the will of the owner into real estate which by archaic rules was then still exempt from liability for simple contract debts. He held the creditors entitled to relief, and that in their favor he would revive the term or treat it as still subsisting.[44] It was one of the Chancellor's contributions toward the minimization of the chronic injustice of feudal survivals in the law.

Another decade brought forth the decision in *Thomas* v. *Kemish*,[45] in which, upon similar principles, relief was granted in favor of an infant who at law had lost his chattel interest in a term of years by its merger in the fee to which he had succeeded. Vestiges of feudality still so qualified the relations of an infant to his realty that the drowning of his chattel term in his fee involved during infancy a serious loss of beneficial power. As in the case of creditors above mentioned, the injustice

[42] The slightly earlier case, *Thorn* v. *Newman*, 3 Swanst. 603, was to substantially the same effect.

[43] 3 Vern. 90.

[44] See the explanations of this decision in *Norfolk* v. *Gifford*, 2 Vern. 208, and in *Douisthorpe* v. *Porter*, 2 Eden 162.

[45] 2 Vern. 348. This case is here described as universally and no doubt properly interpreted by later decisions, although the language of the meager report is suggestive of a somewhat different basis. See the versions of it in the several cases about to be cited.

was of a constantly recurring type, and the infant like the creditor was traditionally regarded as appealing with special force to the Chancellor's favor.

There for a while the equitable doctrine rested, and for something like a century the future of its development was involved in doubt. Did these few exigencies measure its extent? Were there other extremely oppressive situations for which it might make like allowance? Might these few instances even be deemed expressive of a general principle upon which equity should be at liberty to counteract the merger whenever justice clearly so required? Did the equitable jurisdiction arise only when one of the interests affected by the merger was entangled with a trust, or was otherwise purely equitable as was the case in the above instance, or was it equally applicable where both the coalescing interests were legal?

By the time of Lord Hardwicke the doors were understood to have been closed against new grounds of equitable relief. The breadth of many of the old grounds, however, still remained to be determined, as was the case in this instance. As late as 1740, Lord Hardwicke seems not to have had in mind any considerable generalization upon this subject of merger, if we may judge from his remarks in *Seys* v. *Price*.[46] Fourteen years later, in *Chester* v. *Willes*,[47] he leavened the subject afresh by interpreting the refusal of the Chancellors to recognize the mergers in *Powell* v. *Morgan* and *Thomas* v. *Kemish* as referable not to the specific equities of creditor or infant, but to the fact that those mergers had occurred contrary to the expressed or implied intention of the party in whose hands they had taken place, thus connecting the

[46] 9 Mod. 217.

[47] 1 Ambl. 246.

subject up with equity's many-sided extra-legal favor toward intention. Speaking at least of equitable charges, he was therefore of opinion that equity would not recognize their merger against the actual or presumptive will of the party. The new leaven worked slowly. The succeeding Chancellor, Lord Northington, seems to have reverted to the narrower construction of the equity, and also to have esteemed it applicable only where the merging interest involved a trust or was otherwise equitable in character.[48] In the latter proposition, though not in the former, the still succeeding Chancellor, Lord Loughborough, seems also to have concurred.[49]

But the leaven of "intention" was still working, and the broader equity at which it pointed was to prove irrepressible. The welter of the subject in the equity practice, during the half-century following Lord Hardwicke's deliverance, resulted in the vindication of his judgment that in more ways than a few the law was laying upon this altar of formal legal construction costlier sacrifices than equity could bear. Probably among the most crying and recurrent evils of the legal doctrine were the loss of the benefit of covenants of various kinds through merger of the estates with which they ran, and the collapse of trusts through merger of the estates to which they were annexed.[50] After intermediate developments, unnecessary to be followed in detail, the subject took on decisively its modern form in *Forbes* v. *Moffat*,[51] where merger was broadly pronounced a subject upon which "Equity is not guided by the rules of law."

[48] *Douisthorpe* v. *Porter*, 2 Eden 162 (A.D. 1762).

[49] *Lord Compton* v. *Oxenden*, 2 Ves. Jr. 261 (A.D. 1793).

[50] For interesting example see *Webb* v. *Russell*, 3 T. R. 393, 402.

[51] 18 Ves. 384 (A.D. 1811).

As then substantially outlined, the position of equity was that while merger under the conditions defined by law is, in the absence of injustice in the result, as much a matter of course in equity as at law, equity, regardless of the legal or equitable character of the interests involved, will respect the will of the party to keep the interests distinct for the prevention of injustice to himself or to others; and if his will is unexpressed, will accredit him with the intent most consistent with his duty or his interest as the case may be.[52]

For the purely logical metewand of the law, equity thus substituted an ethical standard, flexible enough to adjust itself to the moral exigencies of the particular case. The number and variety of situations in which the ends of justice have been thus subserved are surprisingly great. It will be observed that the defect in the law was unrelated to procedure. It was the case of a bald construction of law which, had it been willing, the law was as well able as equity to avoid. It was a subject upon which the law was not lacking in bland aphorisms, such as that "construction of law shall harm no man." In fact the law's dereliction at this

[52] It may be that in England this is as far as the doctrine has actually unfolded. When occasion arises, however, it apparently must be held there, as it is with us, that equity may refuse to recognize as adequate to either produce or prevent merger, an intention entertained as a means of working out an injustice, as by pursuing one's interest in gross disregard of one's duty. What classes of equities would now in either country be accepted as sufficient to prevent merger when the element of intention is eliminated by a dishonorable and unjust election that there shall be a merger, it is difficult to say. The indications are in favor of a somewhat more liberal view of the subject in this country than in England. *Starr* v. *Ellis*, 6 Johns. Ch. 393, 395; *Hinchman* v. *Admr. of Eman*, 1 N. J. Eq. at p. 110; *Andrus* v. *Vreeland*, 29 N. J. Eq. 394, 396; *Miller* v. *Whelan*, 158 Ill. 555.

point is as hard to explain as equity found it hard to endure.

Another and somewhat similar instance of the balking of equity at injustice which the law tolerated from a sense of logical necessity is the doctrine settled by Lord Macclesfield in *Cannel* v. *Buckle*,[53] a case which in another connection was discussed in the last chapter. Of the old rule that in law husband and wife are one person, the legal personality of the latter being merged in that of the former, it is a perfectly logical application that a bond or other contract must be extinguished by intermarriage of the parties to it. So held the law; and so followed equity, until the case was reached of a bond entered into between the parties to a proposed marriage, in consideration of the marriage and with the defined intention to create an obligation performable after, and only after, marriage. There the views of the two systems diverged, equity seeing in such consideration and intention a moral substance and force whose recognition it rated as of more consequence than the carrying out rigorously, to all its logical conclusions, of the principle of the oneness of husband and wife, and pronouncing it "unreasonable that the intermarriage upon which alone the bond was to take effect should itself be a destruction of the bond." In dealing with the merger of estates, equity seems to have had no other alternative than to follow the law or to flatly contradict it as to the fact of a merger in certain cases. But here, in dealing with the merger of the wife's personality, there were available methods of masking the appearance of opposition between the two systems, to which equity naturally had recourse. Conceding the extinction of the bond or legal contract by the intermarriage, the Chancellor, reverting to the

[53] 2 P. W. 243.

underlying consideration and mutual intention, conceived them to constitute an equity to which the common law rule was not necessarily applicable. He further lubricated his innovation by feigning that at its root the common law rule was one of procedure — prohibiting actions between husband and wife —rather than a rule of substantive law.

A suggestive instance of equitable dissent from one of the law's superlogical interpretations is mentioned in Noy's Maxims. The law said that if two tenants in common grant a rent of ten shillings, this is *several*, and the grantee shall have twenty shillings. In a note it is said equity would no doubt restrain.[54]

So, insisting upon the formal distinction between the granting clause and the habendum clause of a deed, the law as noted in the same work held that "if a termor grant his term to have and to hold immediately after his death, the grantee shall have it presently," upon the ground of the repugnance of the habendum to the granting clause. In the notes this also is said to be relievable in equity.[55]

In some instances an equitable departure from the law in a matter of interpretation has been glossed over by confusing interpretation with rectification; *i.e.* by conceiving equity to be "helping," "relieving," or "correcting" a mistake, when it has simply qualified or neutralized the meaning of some particular clause by construing it more circumspectly than the law with reference to the document's other parts and general nature. Of this perhaps the best example is the line of cases in which equity has been spoken of as correcting mistakes in a will, "*when they are apparent upon the face of the will.*"[56]

[54] Maxim 36.

[55] Maxim 37.

[56] 1 Story's Eq. Jur., secs. 179, 180.

In modern theory these cases are all clear cases of conflicting constructions, as noticed by Mr. Spence,[57] since they are cases in which the Chancellor imputes to the instrument no other meanings than those that he has found in it. There no doubt are occasions when one part of an instrument takes effect upon another part by convicting it of having been framed by actual mistake. With the methods of interpretation at law as well developed as they now are, there probably is no present necessity for the equitable correction of such mistakes. The above citations bear witness that this was not always so, and that formerly it was deemed a province of equity to relieve against mistake in a particular clause of an instrument which its own interpretation of the entire document might disclose. A considerable field for constructions distinctively equitable was thus opened up.

Probably there are no cases that we have been more accustomed to associate with equity's proverbially greater regard for substance than for form, than those in which formalities indispensable at law have been supplied or dispensed with by decree in equity. For as noticed in the last chapter, for that kind of equitable relief we are indebted not only to the capacities of the equitable procedure, but to that moral incentive to action which was supplied by equity's extra legal aversion to the sacrifice of substance to form. This is equally true whether the forms are supplied or dispensed with upon a theory that they were omitted by accident or mistake, or, as is often the case, upon the ground that apart from all questions of accident or mistake, the forms when compared with the consideration and intention are of so

[57] 1 Spence Eq. Jur. p. 539, note o. A like treatment of a deed of settlement may be seen in *Wedale* v. *Halfpenny*, 2 P. W. 151, an interesting case.

unsubstantial a nature that equity must find a way to prevent the invalidation of the transaction by their non-observance. In modern practice the policy of equity has been to minimize the appearance of opposition to the law by punctiliously compelling the actual supply of the missing form whenever it is possible so to do, recourse being had to a decree dispensing with the formality only when for some reason its compulsory supply is impracticable. The further back we go, however, the less evidence we see of any such defined policy, and the more common are decrees dispensing with forms or in one way or another ignoring their absence, without considering the feasibility of their actual supply.[58] It may be remarked, by the way, that this is equally noticeable in the early decrees relieving upon the ground of mistake.[59]

It was in connection with the execution of powers that the supply of or dispensation with forms, by equitable decree, underwent its maximum development. The rule has been general that attempted executions of powers, void at law by reason of formal defects, will be aided and supported in equity in favor of those whose moral claims have been deemed such as to arouse equity to action, *i.e.* purchasers, creditors, wives, children, and charities.

Similarly a surrender being the only legal method of effecting a transfer of copyhold land, equity in favor of a purchaser or mortgagee of such land without surrender has supplied or dispensed with the surrender as standing toward the intention and the underlying consideration in the relation of form to substance. And so, where a

[58] *Scott* v. *Wray*, 1 Ch. Rep. 84; *Thin* v. *Thin*, 1 Ch. Rep. 162; *Priske* v. *Palmer*, 2 Ch. Rep. 129; *Parke* v. *Peake*, Choice Cas. in Ch. 116.

[59] *Colston* v. *Carr*, Toth. p. 27; *Astel* v. *Causton*, 1 Cal. 108.

testator, clearly expressing an intention to pass a copyhold to his creditor, wife, or younger child, has failed to make a surrender of it to the use of his will.

The relief thus afforded from defects in the execution of powers and in the transfer of copyholds has rarely been associated with the theory of mistake. Generally it has been rested squarely upon the principle that, in aid of the moral substance of transactions, equity will supply forms or dispense with them; or sometimes, as noticed a few pages back, upon the principle that from the attempted but defective execution or transfer equity will imply an undertaking to make it good. In the extension of similar relief to other formally defective instruments, this has not been so generally true. For both courts and commentators have quite commonly treated the equitable supply of formal defects in conveyances generally, such as the want of witnesses, the want of a seal, the failure to make livery, and the omission of the formal word "heirs," as referable to mistake; which though unnecessary is of course unobjectionable where, as is usually the case, the inference of mistake is warranted by the circumstances. It is noticeable, however, first that the mistake when there has been one is one of law as often as one of fact, and that the reason why, when a mistake of law, it is yet correctible, is to be found in this loathness of equity to permit the invalidation of substance by formal defects. And secondly that the rectification of instruments for mistake of either law or fact may well be regarded as but one phase of the broader principle of the equitable supply of forms.

In no way was the efficacy of intention more signally advanced by equity than by making it partially self-executing through the principle that equity will regard as done that which ought to be done — a principle which as heretofore noticed is but one phase of equity's greater

regard for substance than for form.[60] The principle means that as far as practicable, for nearly all purposes, equity will treat property that is subject to an equity in the same manner as though already the equity had been worked out by the execution of such instruments or by such other acts of performance as may be necessary to carry it into effect. This is the seed principle from which have sprung all equitable estates, interests, and liens[61]; and also the doctrine of equitable conversion, whereby when land is devised or articled to be converted into money, or money is devised or articled to be converted into land, they shall be deemed immediately impressed by the devise or articles with the character to which they are so ultimately destined.

In equity to a great extent there were thus broken down the differences between conveyance and agreement to convey, between incumbrance and agreement to incumber, and between conversion and direction to convert. These changes had a tendency to alter the practical operation of a good many rules of law. They reversed in its operation the law of intestate succession, by carrying to the heir what otherwise would have gone to personal representatives; or *vice versa*. They qualified the law of wills by making a devise of property as revocable in equity by a subsequent contract to sell it as it is at law by an actual sale. A vendee who at law had acquired no interest in the land might in equity have in it a vendible, chargeable, and devisable estate which would pass as part of his real estate under terms no matter how general and sweeping. A contract to sell or surrender a copyhold was as effectual in equity to bar the widow's

[60] Francis' Maxims of Eq., Maxim No. 13.

[61] The subject is nowhere better treated than in 1 Pom. Eq., sec. 364 *et seq.*

free bench as an actual surrender was at law. A joint tenancy was as well severed in equity by a contract of one of the tenants to sell as it was at law by a sale. In equity a life tenant's contract to execute a power was as binding upon the remainderman as a legal execution of the power would have been. A less trite and especially interesting application of the principle was made in *Frederick* v. *Frederick*,[62] where in consideration of marriage a man had agreed to take up his freedom of the city of London where there was a local custom as to the distribution of personal estates of decedents. Upon his death without having done so, the local custom was held as controlling in equity in the distribution of his personalty as though his covenant had been fulfilled.

It is clear that to the administration upon any considerable scale of the maxim treating as done what ought to be done, some such compulsory process as that of equity is a necessity. The fallacy of thence inferring that the maxim is a derivative from the process, or is fully accounted for by it, is pointed out in the last preceding chapter in discussing specific performance, where the co-operation of ethical qualities distinctive of equity is believed to have been shown. So the nature of equitable estates, though germane to the present maxim, is reserved for discussion in the chapter on uses and trusts.

Somewhat akin to the maxim we have been considering, if not included in it as the half in the whole, is the equitable doctrine respecting performance — "the doctrine that when a person under covenant to do an act does that which either wholly or partly may be converted into or towards a fulfillment of the covenant, it shall be presumed to have been done with that intent.[63] Thus

[62] 1 P. W. 710; S. C. 1 Str. 455, and 1 Bro. P. C. 7.

[63] 2 Lead. Cas. in Eq., marginal p. 415.

the act is presumed to have been done for the particular purpose for which it ought to have been done.

Thus far as to equity's distinctive methods of dealing with intention, whether by pursuing it more searchingly than the law, by a freer indulgence in presumptive meanings, by a more effective discrimination of the grand from the particular or modal intent, or by charging intention with more than legal force. We have now to notice the extent to which, independently of all points of intent, equity subordinated considerations of form to those of substance in dealing with questions of performance.

It was a subject upon which the early law was rigorously logical. In the case of a bond, even full performance would not discharge from liability. Logic was supposed to require that the obligor continue liable until discharged by an instrument of as much formality and solemnity as that by which he had become bound. Equity never acted more characteristically than in restraining as it did actions upon such paid but unacquitted bonds.

The rigid rule of our early law was that there could be no virtue in any attempted fulfillment that fell short of strict or exact performance; and the earlier the law the more rigid the rule. Imperfect performance was no performance at all, and often fell as a dead loss, owing to comparatively trivial defects. The injustice thus entailed must have assumed really grievous proportions. The view that equity took of the matter was that where justice seemed to require it, a substantial performance, *i.e.* a reasonable approximation to performance, should be treated as sufficient if the defects were reasonably excusable and if suitable compensation for them could be ascertained and made. The legal view, partly through liberalized constructions and practice and partly through legislation, has now been so far assimilated to the equitable that a little effort is necessary to appre-

ciate the value of the innovation at the time it was made.

The principle upon which equity has acted in such cases is well enough stated by Sir John Romilly, M.R., in *Parkins* v. *Thorold*,[64] where, after disclaiming the right to interpret the contract differently from the law, he emphasized the reluctance of equity to apply standards of performance which involve the sacrifice of the substantial to the unsubstantial by saying: "But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form the substance will be defeated, it holds it inequitable to allow a person to insist on such form and thereby defeat the substance."

The most constantly recurring defect in performance is delay beyond the appointed time. Relief from it was so habitually afforded by the Chancellor, upon compensation, that it became a maxim that in equity time is not of the essence, unless so expressly declared or so required as a matter of justice owing to peculiar circumstances. These qualifications seem to import that the maxim is one of interpretation, and it was not very early that the contrary could be affirmed.[65] It is now settled, however, that the maxim does not impute to the parties a new

[64] 16 Beav. 59, 66, 67. It is customary to explain the law's exaction of strict performance as due to its want of pleadings and procedure flexible enough to deal with the compensation for defects. But that the vice was deeper-seated in a mode of reasoning too stringently logical, is copiously illustrated by analogous legal exactions where it has been a matter of legal construction purely, uncomplicated with questions of compensation or procedure. Notice for example the points presently to be mentioned, supported by notes 67 to 71.

[65] Baron Alderson in *Hipwell* v. *Knight*, 1 Y. & Coll. at p. 415, approved in 2 Story's Eq. Jur., sec. 776, n. 1.

meaning, but signifies only that equity will relieve and enforce specific performance with compensation where justice dictates it even though default has been made.[66]

A few other types of cases in which equity has rejected common law overvaluations of the unsubstantial may be noticed as illustrating the contrasted modes of reasoning. In an old case in Cary,[67] it was held that though at law *non est damnificatus* is a good plea to an action on a surety's counterbond to save him harmless, if the surety pays *at the day* from fear of arrest, yet equity will relieve and order his reimbursement.

Where an estate was conditioned upon payment of a sum of money to a third party at a given time and place, payment at another place, though accepted by the payee, was not at law a good performance.[68] But undoubtedly equity would relieve.[69]

"At law," says Coke, "tender must formerly have been made only to the person named in the condition. In equity, however, it may be made to the person entitled to receive the money and convey the estate." [70]

There were maxims of the common law that no right could be barred before it accrued, and that no right or title to a freehold could be barred by acceptance of a collateral satisfaction. By that law, therefore, all attempts to bar dower by substituting other interests under any form of antenuptial contract or settlement were abortive. The widow could claim both her dower and the interest she had agreed to accept in lieu of it. The supposed necessities of logic and form of which

[66] *Tilley* v. *Thomas*, L. R. 3 Ch. App. Cas. 61, 67, 69.

[67] P. 26.

[68] Co. Litt. 212 b.

[69] Baron Powell, *arguendo* in *Bath and Montague's case*, 3 Ch. Cas. at p. 68.

[70] Co. Litt. 210; Harris on Tender, 97.

these maxims were the expression did not, in equity, seem to warrant so unjust a result as this taking of the benefits of the antenuptial agreement without its burdens. Equity therefore mitigated the law's rigor by requiring the widow to choose between that benefit and her dower.[71]

The Statute of Uses, 27 Hen. VIII, c. 10, provided that dower might be barred by a jointure conferring upon the intended wife a freehold interest in land. After the lapse of a couple of centuries, during which the English people passed from a feudal to a commercial status, it was held in equity that whatever may have been its original merits, the distinction in favor of freeholds in land was no longer a substantial one; and that equitably dower might be absolutely barred by a jointure of other trustworthy properties such as trust estates, copyholds, and the public funds.[72] The holding was said to be in line with a long-standing practice in equity and among conveyancers. Lord Hardwicke, who spoke for the House of Lords, after adverting to the change in conditions, explained the ruling as follows: "The general rule is, equity follows the law in the substance though not in the mode or circumstances of the case. Therefore if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. Every certain provision with consent of the wife's parents or guardian, though not a jointure within the statute 27 Hen. VIII, is good in equity. This is built on maxims of equity, which regards the substance and not the forms."

[71] *Lawrence* v. *Lawrence*, 2 Vern. 365; Co. Litt. 36b and note 224; *Charles* v. *Andrews*, 9 Mod. 152.

[72] *Earl of Buckinghamshire* v. *Drury*, 2 Eden, 60, 65. The decision is, on this point, unimpaired by criticism except as to its application of the principle to a woman who was a minor at the date of the jointure.

Quite characteristic also were the contrasted positions of the two systems upon the doctrine of consideration. The solemnization of an instrument by sealing appealed so strongly to the common law that it was accepted as dispensing with the necessity of an actual consideration, upon the ground, as generally stated, that from the formality a consideration would be presumed. This was a concession to formalism that equity declined to make. It would enforce no contract, however formal, which had not the moral support of either a valuable or a good consideration.

So the priority over simple contract debts which, in the distribution of assets, the law accorded to debts more formally evidenced by specialty or record, equity declined to recognize in distributing equitable assets, reasoning that in conscience the formal debts were no more meritorious than the informal, and that the principle of equality was of too much substance to be sacrificed to so formal a distinction. And this view equity so far enforces upon participants in legal assets that "if any creditor has been partly paid out of legal assets by insisting on his preference, and he seeks satisfaction of the residue of the debt out of the equitable assets, he will be postponed till all the other creditors not possessing such a preference have received out of such equitable assets an equal proportion of their respective debts."

Finally may be instanced the common law rule that because a sealed obligation could be discharged only by an equally formal instrument, a simple accord and satisfaction could be no defense to an action upon a bond — a rule which in England at least seems to have survived until the legislative blending of the two jurisdictions. "If," said Wills, J., in speaking for the court in *Steeds* v.

Steeds,[73] "in satisfaction of an overdue bond for one thousand pounds, the persons liable had given property worth two thousand pounds which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his one thousand pounds without returning the property." To counsel's contention that in such a case equity would not relieve, the court answered: "We are glad to say that we are unable to agree with him, and that we think he has done an injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law."

How noteworthy an influence was exercised by equity's estimate of the relative importance of substance and form, in shaping her doctrines of fraud, will appear as an incident of the review of those doctrines in the following chapter.

[73] 22 Q. B. D. at pp. 539, 540.

CHAPTER VII

FRAUD

Turning next to fraud as one of the three traditionally capital heads of equity jurisdiction — "Covin, accident, and breach of confidence," we are interested to notice how far the modes of reasoning brought to bear upon the subject by equity have served to temper common law principles whose comparative rigor was fairly referable to other causes than inadequacies of procedure.

It is the general rule that in early systems the law of fraud is extremely meager. It was so in the old *Jus Civile*, where transactions formally perfect were not subject to invalidation for either fraud or duress.[1] The principal reasons for this early tendency are: that the right to rely upon the good faith of others is so imperfectly developed that one so relying to his injury seems to be a victim of his own folly; that an exaggerated verity and sanctity then attach to the formalities of expression or act by which transactions are solemnized; and that it is only with reluctance that early law undertakes the determination of mental states such as personal knowledge and deceitful intention.

Many traces of backward conditions in this regard have survived in our common law far into the historic period. It was due to such modes of reasoning for example that until the statute of 33 Hen. VIII it was not deemed a criminal offense to get money by false pretenses or representations, except when taking the form of some false

[1] Sohm's Inst., book 2, sec. 29; Ortolan's Hist. of Roman Law, 639.

token or misleading artifice that might make the reliance of the victim seem excusable. So the account of the writ of deceit given in *Natura Brevium*, A.D. 1534, shows clearly that the deceits for the redress of which it had been employed originally and almost exclusively were not deceits of individuals merely but were acts calculated also to deceive courts, such as false impersonations in judicial proceedings, false returns and other abuses of legal process, embezzlement of writs, collusion of attorneys, and the fabrication of evidential documents. Apparently the only exceptions were a few cases in which breach of contract was treated as a deceit. The writ undoubtedly would have broadened in its uses had its development not been arrested by the advent of the action on the case as a competitive proceeding for the redress of deceits.

How narrow were the conceptions of relievable fraud upon which the action on the case long proceeded, is well illustrated by the following three notable limitations upon its range:

(1) All the indications are that for a long time practically the only false representations of purely private character dealt with by actions on the case were such as were expressly or impliedly warranted to be true. As for anything like a fairly developed theory of a liability sounding in tort only, for willful misrepresentations as such, we must date it from some time in the eighteenth century, possibly from the dawn of the century as some would consider, but perhaps with greater propriety from near the close. That in the century's third quarter fraudulent representations merely as such were not far from negligible, is suggested by the fact that Blackstone in his only discussion of deceits makes no reference to liability for mere willful misrepresentation not amounting to false warranty, while taking pains to point out

that if one by artifice conceals the falsity of his representation, he becomes liable upon the ground that the artifice is equivalent to a warranty.[2] Such also had been the indications of the somewhat earlier work of Finch.[3]

The oldest line of cases seeming sometimes to recognize liability for misrepresentations apart from warranty, is that dating back to 42 Ass. pl. 8, cited in 4 Co. 18b, where one was held liable for deceit in selling as his own the goods of another of which he had become possessed. It became well settled, however, that the principle of liability in such cases was that a representation of ownership by one in possession of a chattel amounted to a warranty. And so it might well be considered, for the reason, if for no other, that possession is so far a badge of ownership that its use to credit a false claim of title might justly be accounted an artifice in concealment of the falsity, within the meaning of Blackstone's above cited doctrine.[4]

If this is a correct view, then cases of statutory origin aside, apparently the earliest reported recovery in an action on the case for false representation without warranty was in 1664 in *Leakins* v. *Clizard*,[5] where the

[2] 3 Bl. Comm. 165, 166.

[3] Finch's Law, 188.

[4] See the reasoning of Tanfield, C.B., in *Rosswell* v. *Vaughan* (1607), Cro. Jac. 196, and of Holt, C.J., and Gould, J., in *Medina* v. *Stoughton* (1701), 1 Ld. Raym. 593; S. C. Salk. 210, and in *Crosse* v. *Gardner* (1689), Carth. 90. The point is not one upon which the law could have moved backwards, and these cases show what must have been the principle of a few early decisions too meagerly reported to disclose it, such as Dale's case, Cro. Eliz. 44, and *Furnis* v. *Leicester*, Cro. Jac. 474, as well as of *Turner* v. *Brent*, 12 Mod. 245.

The gradual multiplication of implied and constructive warranties was of course largely influential in wearing away the notion that a warranty was necessary.

[5] 1 Keble 510, 518, 522.

vendor of an interest in land was held liable for willfully overstating its yield of rentals, the plaintiff's point of emphasis being that the fact was one within the vendor's "certain knowledge." No other case of mere misrepresentation appears to have been reported until 1705, when in *Lysney* or *Rysney* v. *Selby*,[6] upon a precisely similar state of facts, the authority of the *Leakins* case was recognized and like ruling made. These decisions did not import an abandonment of the general rule requiring warranty, but only an abrasion of it or an exception to it, in the case of a statement so certainly within the speaker's knowledge as the amount of his own rentals. They meant that in this type of cases the peculiar relation of the speaker to the matter spoken about was enough to induce the confidence which ordinarily could be invited and justified by warranty only.[7] But it thus having come to be recognized, as stated by Powell, J., in the *Lysney* case, that "there are actions upon the case in nature of deceit which lie upon a false affirmation without a warranty," it was inevitable that with advances in commerce and in popular morality, warranty should be gradually dispensed with in an increasing variety of cases.[8] Yet how

[6] 2 Ld. Raym. 1118, 1121.

[7] *Harvey* v. *Young*, Yelv. 21.

[8] Even now we have a residuum of misrepresentations which are not actionable however willful they may be, because the party to whom they are made is not legally justified in relying upon them: as in certain cases of entire equality in means of information, certain matters of mere opinion, and the like. Kerr on Fraud, 4th ed., 51–4. The attitude of the old law toward mere misrepresentations generally was very much as ours is toward this residuum. In 1602, in *Chandelor* v. *Lopus*, Cro. Jac. 4, which was an action against a jeweler for selling a stone upon the false representation that it was a bezar stone, it was declared by the judges, according to the report, that "though they knew it to be no bezar stone, yet it is not material, for everyone in selling his wares will affirm that his wares are good." As this if

surprisingly sluggish and indeterminate the movement proved to be is seen in the fact that so capable a judge as Grose, J., speaking three-quarters of a century later by way of dissent in *Pasley* v. *Freeman*, presently to be cited, considered that no case could be found of action upon false affirmation except "where there is a promise either express or implied that the fact is true," and

said was by way of dictum, many of late have doubted whether even then the law was so understood. But the dictum is true to conceptions which we have every reason to suppose current at that time. Quite in line with it is the dictum in *Rosswell* v. *Vaughan*, Cro. Jac. 196, about five years later, wherein the willful misrepresentation of a horse as sound was assumed to be non-actionable. The earliest reported judicial utterance that can be considered inconsistent with it seems to have been in 1709, after the lapse of one of the longest centuries, so to speak, in English history. For from the accession of James I to the age of Queen Anne is as far a cry legally as it is politically. The ruling in 1709 was that it was actionable deceit for a merchant to sell one kind of silk for another more valuable kind. *Hern* v. *Nichols*, 1 Salk. 289. But as it was about this time, according to Lord Butler, 3 T. R. at p. 57, that the doctrine was introduced by Lord Holt that although not so expressed, an affirmation might be construed as a warranty whenever from all the circumstances it should appear to have been so intended, this, though not referred to in the brief report, may have been the principle upon which this *Hern* case turned. Or it may have turned upon the theory of implied condition or warranty finally applied to such cases. Benj. on Sales, 3d Am. ed., p. 618, 619. In a note at p. 75 of Dyer, Popham, C.J., is reported as having called attention, in *Chandelor* v. *Lopus*, to the fact that there was a right of action for deceit in selling as sound provisions or other goods known to be unsound. Such a reference to a rule relating specifically to damaged goods appears to imply the absence of any acknowledged broader rule covering willful misrepresentations generally, and so seems not to discredit the dictum reported by Salkeld as some have reasoned (14 App. Cas. at p. 357), but rather to verify it, especially in view of the fact that the rule with respect to the deceitful sale of damaged goods had its root in statutes some of which in the case of provisions dated as far back as 51 Hen. III. Benj. on Sales, 3d Am. ed., sec. 672.

that all the previous cases for misinformation might be turned into actions of assumpsit. So obstinate was the old notion that the only actionable deceit and tort in such cases was in a breach of contract, a notion which although scotched by earlier sporadic cases was not killed, as is generally conceded, until the *Pasley* decision in 1789.

That the mode of development here attributed to this phase of the doctrine of fraud is not unnatural or improbable, is suggested by the familiar fact that it was along lines substantially parallel to these that liability for negligence was introduced into the common law. Just as misrepresentations, though known by their makers to be false, were for a long time not generally actionable unless expressly or impliedly warranted to be true, so damaging failures to exercise due care or skill were actionable at first only where an obligation to be careful or skillful was deemed to have been assumed by some express or implied promise undertaking or assumpsit. In each case after the contractual element had served its purpose as falsework, it to a great extent crumbled away gradually, leaving willful misrepresentation and negligence capable of standing alone as pure torts when occasion required.

(2) It was natural that until it practically ceased to rest upon a finding of warranty, the liability for fraud should be deemed inapplicable to representations even though known to be false, made by a bystander with no interest in the transaction. And such seems to have been the understanding at law, until in 1789 the contrary was held in *Pasley* v. *Freeman*,[9] where damages were

[9] *Pasley* v. *Freeman*, 3 T. R. 51. This case is described by Mr. Kerly as "the starting point of a series of decisions which practically assimilated the doctrines of common law, in regard to fraud, with those of equity." Hist. of Eq., p. 181.

held recoverable against a third party who, being questioned by one of the parties to a transaction as to the responsibility of the other, had knowingly misrepresented that he was responsible.

(3) Another restriction upon the principle of fraud which, though smacking strongly of early formalism, survived in the common law until past the middle of the eighteenth century, and in some of our states well into the nineteenth, was the rule that the only fraud by which an instrument solemnized by sealing could be invalidated was some fraudulent artifice connected directly with the execution of the instrument, such as a false reading of it to the signer, or a furtive substitution of another writing for that intended to be signed. All deceits respecting the consideration, and all illegalities in it, were excluded from judicial cognizance by the presumptions of validity arising from the seal. And quite generally the verity of records was supported by presumptions equally conclusive; the maxim, "a deed cannot be defeated by anything less than a deed," being paralleled by the maxim, "no one shall be permitted to aver against a record." As respects specialties the principle began to crumble in 1767 in *Collins* v. *Blantern*,[10] where in an action upon a bond it was held a good defense that its consideration, *i.e.* the stifling of a prosecution for felony, was illegal. Until then, as remarked by Sir Edward Sugden,[11] "it was the general opinion that a court of law would not advert to a consideration unless it appeared on the face of the instrument." Such was declared by Lord Hardwicke to be the common law in cases of fraud as late as 1755.[12] Ultimately, in America at least, but

[10] 2 Wils. K. B. 347.

[11] 2 Sugden on Powers, ch. 11, sec. 2.

[12] *Bridgman* v. *Green*, 2 Ves. Sr. at p. 629.

very slowly, it came to be considered admissible for the law to take notice of fraud as well as of illegality in connection with the consideration of a specialty.[13]

It seems reasonable to suppose that by these three restrictions alone, to which reference has been made in this chapter, a very large percentage of all even actual and willful frauds must have been left not cognizable at law.

But so far as the writer's observations have extended, none of these restrictions seems ever to have been recognized in equity. The law in ultimately rejecting them as indefensible was only following equity's lead.

As to the last mentioned of the three, which misemployed the formality of sealing to shield from invalidation a consent obtained by fraud, it was so extreme an instance of the exaltation of form over substance as to present an ideal occasion for equitable dissent. In the pursuit of fraud equity knew no difference between sealed and unsealed instruments.[14]

As to the other two restrictions, viz., that in order to be actionable a misrepresentation must amount to a warranty, and must be made by a party interested in the transaction, they appear to have been negatived in equity at an early day. By Lord Eldon in *Evans* v. *Bicknell*,[15] it was said to be "a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make the representation good if he knows it to be false." This statement has been accepted as accurate, and it imports an ancient

[13] See American cases cited in 1 Smith's L. Cas., marginal pp. 170, 171.

[14] *White* v. *Small*, 2 Ch. Cas. 103 (1682); Anon. 2 Eq. Cas. Abr. 478, pl. 1 (1687); *Kirwan* v. *Blake*, 2 Eq. Cas. Abr. 482, pl. 18 (1721); *James* v. *Greaves*, 2 P. W. 270 (1725).

[15] 6 Ves. at p. 182.

right to relief in equity for misrepresentations willfully made even by one not a party to the transaction and without any reference to the principle of warranty. This version of the equitable rule is borne out by early cases.[16]

It is not to be supposed that Lord Eldon regarded his foregoing words as descriptive of the full breadth of the equitable principle in question. At the moment he was concerned only to show that the principle covered such a case as *Pasley* v. *Freeman*, where a misrepresentation had been made with knowledge of its falsity. Further on in his opinion he noticed the applicability of the principle to many concealments and to other forms of misleading conduct as well as to misrepresentations, and pointed out the equitable accountability of the speaker or actor not only for his statements and conduct known by him to be misleading, but for such as would have been so known but for his own culpable negligence.

Thus as the foregoing citations sufficiently illustrate, as far back at least as the seventeenth century equity in the exercise of its jurisdiction over frauds had so

[16] *Hobbs* v. *Norton*, 1 Vern. 136 (1682); *Hunsden* v. *Cheyney* 2 Vern. 149 (1690); *Draper* v. *Borlace*, 2 Vern. 369 (1699); *Whittingham* v. *Thornburgh*, 2 Vern. 206 (1690); *Barret* v. *Wells*, Finch's Prec. in Ch. 131 (1700); *East India Co.* v. *Vincent* (1740), 2 Atk. 83; *Styles* v. *Cowper*, 3 Atk. 693. Within the last few years in England the doctrine relative to the "making good" of false representations has been pronounced exploded, by writers of the highest repute. But this has reference only to that phase of the doctrine which has supposed that besides tendering relief by way of compensation, estoppel, or rescission, which has never been matter of doubt, equity has stood ready when practicable to compel a specific fulfillment of the representation. Whether it has or not is not material for our purpose, as we are interested only in the fact of early equitable relief and not in its form.

advanced the standards of good faith as to produce a fairly developed doctrine of what we now term equitable estoppel. For although such relief as rescission or compensation would be administered by equity as a means of approximately "making the representation good" when no more ideal form of redress was available, the policy of the doctrine was to work out justice wherever possible by barring the misleading party from any other rights than such as would have been his if the facts had been in accordance with the false impression which he had culpably produced, which is the exact function of equitable estoppel as afterwards enforced and denominated both at law and in equity. And this equity was freely enforced by the Chancellors even upon litigants at law by injunctions against the setting up there of causes of action or defense not consistent with it.

That this doctrine of equitable estoppel thus originated in equity is admitted by all.[17] In range, efficiency, and beneficence of operation, it seems comparable to the principle of implied and constructive trusts, and it appears to justify Mr. Bigelow's description of it as "one of the most important, useful, and just factors of the law." The foregoing citations show it regularly administered in equity about a century and a half before its judicial adoption into the law, which in England was as late as 1837.[18]

[17] *Horn* v. *Cole*, 51 N. H. 287; *Brewer* v. *Boston, etc., Ry. Co.*, 5 Metc. 483; *Davis* v. *Wakelee*, 156 U. S. 686; Big. on Estoppel, 6th ed. revised, p. 605.

[18] Its earliest application at law was in *Pickard* v. *Sears* (1837), 6 Ad. & El. 469, though by way of dictum it had been put forward eight years earlier, in *Heane* v. *Rogers*, 9 Barn. & Cress. 586. It had also been recognized at law in New York in 1828 in *Stephens* v. *Baird*, 9 Cow. 274.

Since that time the two systems have not differed widely in their interpretations of the general principle or in the numberless elaborations of detail by which they have answered, with respect to first one and then another of the infinitely varied relations of life, such questions as the permissibility of mere silence, the degree of contrivance or machination, if any, necessary to constitute concealment, the necessary constituents of misleading conduct, what shall be deemed culpable negligence in the misleader or in the misled, and so forth. Yet it may be stated without risk that the initiative in occupying ethically advanced positions upon these and kindred subjects has been taken far more frequently by equity than by the law. Nor does there seem to be any doubt that independently of the doctrine of equitable estoppel, in the enlargement of the conception of fraud so as to include *suppressio veri* as well as *suggestio falsi*, equity was the pioneer.[19]

It was also strictly in correction of the common law that equity assumed to denounce as underhanded, and to invalidate as fraudulent against third parties, several groups of contracts that were unimpeachable at law. Thus in 1684 in *Peyton* v. *Bladwell*,[20] and regularly thereafter,[21] a secret contract to refund a part of a marriageportion or provision was held void in equity as a fraud upon unconsenting parents, guardians, or other similar parties in interest. No trace of similar principle seems to have appeared at law for more than one hundred years.

It was upon the same principle largely that in 1695 in *Hall* v. *Potter*,[22] and regularly thereafter, marriage

[19] *Broderick* v. *Broderick*, 1 P. W. 240, 241; *Meade* v. *Webb*, 1 Bro. P. C. 308.

[20] 1 Vern. 240.

[21] 1 Salk. 156.

[22] 3 Lev. 411; Show. P. C. 76.

brokerage contracts were held void in equity. "There was no objection at common law till perhaps some hundred years ago to such contracts; but the courts of equity took a different view, and in consequence the courts of common law modified their view of the matter and shaped their course accordingly."[23]

Upon like reasoning it was held in equity in 1721 in *Middleton* v. *Lord Onslow*,[24] that in case of a composition with creditors a secret agreement for additional payments to one creditor was void as a fraud upon the others. It seems to have been as late as 1788 before law followed equity in this regard.[25]

Similarly equity has invalidated in favor of the husband, secret dispositions of a wife's property made by her before marriage and pending the treaty for it.[26] As late as 1852 at least, there appears to have been no instance at law in England in which the principle had been applied to this class of cases.[27] Probably it is a class with which the law is not processually qualified

[23] Collins, M. R., in *Hermann* v. *Charlesworth*, 1905, 2 K. B. at p. 133. And see p. 137, where Lord Talbot is quoted as declaring such contracts good at law in 1735. This is described by Mr. Justice Story as "one of the innumerable instances in which the persuasive morality of courts of equity has subdued the narrow, cold, and semi-barbarous dogmas of the common law." 1 Eq. Jur. 13th ed., sec. 262. Upon like principle equity avoided promises of compensation for influencing a testator in the making of his will, or of compensation to a father for consenting to the marriage of his child, *ibid.* secs. 265–6.

[24] 1 P. W. 768.

[25] *Cockshott* v. *Bennett*, 2 T. R. 763. This case and that of *Jackson* v. *Duchaire* (1790) 3 T. R. 551, seem to mark about the time when in the common law the principle of the invalidity of underhand agreements may be said to have arrived. See *Jackman* v. *Mitchell*, 13 Ves. at p. 586.

[26] *Countess of Strathmore* v. *Bowes*, 1 Ves. Jr. 22 (1789)

[27] *Doe* v. *Lewis*, 11 C. B. at p. 1048.

to deal, since it is a peculiarity of the transaction that it cannot be pronounced void at its inception, and that the marriage which is a necessary factor in its vitiation only entitles the husband to a decree of annulment or vacation.

The same principle underlay the relief afforded by equity from catching bargains with heirs and expectants during the lives of their ancestors, the latter being regarded as misled by such bargains "to leave their estates not to their heirs or families but to a set of artful persons who have divided the spoil beforehand."[28]

Equity also made what seems like a characteristic correction of the law in dealing with statutes aimed at frauds. It was plainly declared to be a province of equity to prevent the use of such statutes as instruments of fraud, although there seem to have been but a few statutes upon which the rule was brought to bear. To the Statute of Frauds it was applied in several ways. Thus the cases bear out the dictum of Lord Chancellor Parker in *Montacute* v. *Maxwell*,[29] that in cases of fraud "equity should relieve, even against the words of statute, as if one agreement in writing should be proposed and drawn and another fraudulently and secretly brought in and executed in lieu of the former." So a devisee preventing a testator from charging a legacy by undertaking to pay it is bound in equity though not at law. "In that case there is no will giving the lagacy; but this court says that he who prevented that shall stand in this court in a very different situation from that in which he would stand in a court of law, where he would be a devisee without any charge; but in this court, having by his undertaking prevented an effectual

[28] *Chesterfield* v. *Janssen*, 2 Ves. 157.

[29] 1 P. W. 619, 620.

charge, he shall be subject to it.[30] So it was held by Lord Nottingham, soon after the making of the statute, that equity would relieve against one who having received as mortgagee an absolute deed refused to execute the agreed instrument of defeasance.[31] So without reference to any agreement for a defeasance, equity, notwithstanding the statute, will relieve on the ground of fraud against one who, having received as a mortgage a deed absolute in form, claims the right of an absolute owner.[32] And so in the case of a husband who should fraudulently claim the equity of redemption in a leasehold assigned to him by his wife in order that he might mortgage it and then reconvey to her.[33]

Upon similar grounds equity, despite the statute, will enforce trusts upon which property was understood to be conveyed, though not mentioned in the deed.[34] And so apparently if the putting of a contract into writing, after having been agreed upon, is prevented by fraud.[35]

It was also a principal reason for equity's specific enforcement, in the face of the statute, of partly performed oral contracts for the sale of land, that otherwise the statute would be used as an instrument of fraud.[36]

So although by Statute 7 Anne, c. 20, s. 1, a registration act for Middlesex County, it was provided that

[30] Lord Eldon, in *Mestaer* v. *Gillespie*, 11 Ves. at p. 638. Lord Eldon's doubts about the applicability of the rule to the ship registry statutes before him were due to the extent to which those statutes aimed at the protection of certain public interests.

[31] 1 Eq. Cas. Abr. 20, pl. 5; *Young* v. *Peachy*, 2 Atk. 258.

[32] *Lincoln* v. *Wright*, 4 DeG. and J. at p. 22.

[33] *Davis* v. *Whitehead*, 1894, 2 Ch. 133.

[34] *Rouchefoucauld* v. *Boustead*, 1897, 1 Ch. at pp. 206–7.

[35] *Wood* v. *Midgley*, 5 DeG. M. & G. 41, 45.

[36] 2 Story's Eq. Jur., 13th ed., sec. 759.

unregistered conveyances should be deemed fraudulent and void as against subsequent purchasers and mortgagees, equity held it a relievable fraud for a subsequent purchaser or mortgagee to take with notice of the prior though unrecorded conveyance.[37] The contrary was always understood to be the rule at law, and in 1821 it was so held.[38]

Another of the more striking assertions by equity of the right to impeach for fraud transactions that were invulnerable at law, is to be seen in the injunctions by which she restrained the enforcement of common law judgments that in her estimation had been fraudulently obtained.[39] They were cases, speaking generally, in which the law could have relieved but would not, owing usually to its overvaluation of the solemnities of a judgment, and sometimes also to its failure to rank as fraudulent tricks and artifices so classed by equity. It was the determination of equity thus to enforce her own standards of fraud even in counteraction of common law judgments that brought on the most spirited and memorable contest that ever occurred between the two systems. The triumph of equity was complete.[40]

In the exercise of its acknowledged function of conserving the substance of transactions against the undue dominance of forms, as well as by virtue of its more specific jurisdiction over frauds, equity asserted the right to invalidate an apparent assent or agreement not only when induced by willful deceit but when for other reasons it was not the result of that free and unmisled exercise of a

[37] *La Neve* v. *La Neve*, Ambl. 436, S. C. 3 Atk. 646.

[38] *Doe d. Robinson* v. *Alsop*, 5 Barn. & Ald. 142.

[39] 2 L. Cas. in Eq., 4th Am. from 4th Lond. ed., pp. 1291, 1365–70.

[40] 1 Ch. Rep., append. 26; 2 Lives of L. Chanc., chap. I.

competent and not too greatly perturbed will, which in equitable estimation was the substance of a legal act. For respecting the conditions of a binding contractual assent or intention, equity undertook to enforce principles variant in many ways from those of the law. Often where the law would see assent, equity, owing to its higher standards of competency and freedom of will, would see only a false appearance of assent. An attempt to secure and enforce as binding the assent of one who from equitable points of view was at the time and under the circumstances incapable of competent and free volition, and who was known so to be, equity construed to be a fraud, and was not deterred from so holding by the fact that judged by common law standards the assent was good. Those standards were regarded as too rigorous to be invoked conscientiously. The rulings about to be cited might well have been regarded indeed as applications of the principle upon which the equitable doctrine of substantial performance was rested by Lord Erskine,[41] *i.e.* "that equity does not permit the forms of law to be made instruments of injustice, and will interpose against parties attempting to avail themselves of rigid rules of law for unconscientious purposes." The reiterated doctrine of equity is that there are circumstances under which it may be fraudulent even to claim the benefit of the law. In the working out along these lines of her peculiar views upon the law of assent, equity was led on to the gradual definition of what has proven to be a large group of actual and constructive frauds. They flow quite generally from a mode of reasoning utterly alien to the old common law, and at some points no doubt exhibit the characteristic infirmity of equity in venturing

[41] *Halsey* v. *Grant*, 13 Ves. 73, 76. And see to like effect, Lord Eldon in *Seton* v. *Slade*, 7 Ves. at p. 274.

to pursue ethical distinctions even to somewhat impractical extremes.

Upon the subject of assent the common law had one feature that was a positive deformity. An idiot, lunatic, or insane person was not permitted to impeach his transaction on the ground that by reason of his malady he was, to the knowledge of the adverse party, incapable of assenting. Such a course the law banned as self-stultifying. The rule, it is true, was so narrowed to the incompetent personally that the transaction might be avoided after his death by his heir or personal representative, or even during his lifetime at the suit of the King. In the second quarter of the eighteenth century it was held that even in an action against the incompetent, the incapacity while not pleadable might in certain cases be proven under the plea of *non est factum*.[42] The general rule evidently was regarded by Blackstone[43] as subsisting in his day, and in fact was not renounced in England until by Lord Tenterden in 1826.[44] A hundred years before that, the Chancellor had declined to recognize the rule except as applying to "acts done by the lunatic to the prejudice of others," and had held that even if it were otherwise the rule would not be applied where the committee of the lunatic was joined as party to the action.[45]

Again, although the levy of a fine by one *non compos mentis*, or his sufferance of a recovery or acknowledgement of a statute or recognizance, was not voidable at law even by heir or executor, owing to its solemnity as a

[42] *Yates* v. *Boen*, 2 Strange 1104 (1739); Newland on Contracts 17.

[43] 2 Bl. Comm. 291, 292.

[44] *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170; *Browne* v. *Joddrell*, 1 Moo. & M. 105.

[45] *Ridler* v. *Ridler*, 1 Eq. Cas. Abr. 279.

record,[46] equity, distinguishing more keenly between form and substance, and less ruled by form, would relieve.[47]

The rule against self-stultification was enforced by the law against one entering into a transaction while disabled by drunkenness, with the added reason that his incompetency had been brought on by his own folly. Equity introduced the qualification that relief would be granted if the intoxication had been contrived by the adversely interested party.[48]

Of much more importance was equity's method of dealing with various partial impairments of volitional capacity for which the law made no allowance at all. For it was recognized by equity that there were various constantly recurring situations in which even the partial loss of free agency by a party to a transaction left him so materially less able than the generality of mankind to care for himself as to make him a fit object of the Chancellor's special favor or grace. "If the party is in a situation in which he is not a free agent, and is not equal to protecting himself, this court will protect him."[49] The protection has been worked out through the Chancellor's recognized jurisdiction over frauds. Often, especially where the disability has been pronounced and the transaction grossly oppressive, the mere taking of an unfair advantage of the infirmity has been deemed itself a fraud.[50] Sometimes from the unconscionableness of the bargain and the impairment of free agency, fraudu-

[46] *Beverley's* case, 4 Co. 124 a; *Mansfield's* case, 12 Co. 124.

[47] Newland on Contracts, 19; *Addison* v. *Dawson*, 2 Vern. 678; *Clerk* v. *Clerk*, 2 Vern. 412.

[48] Sir Joseph Jekyll in *Johnson* v. *Medlicott* (1734), cited in 3 P. W. 131, note a; *Cooke* v. *Clayworth*, 18 Ves. 12.

[49] *Evans* v. *Llewellyn*, 1 Cox 340.

[50] *Ibid.*

lent machination has been presumed or has been readily inferred from slight testimony.

The numberless instances in which, through this combined operation of its more exacting standards of free agency and its more searching conception and keener pursuit of fraud, equity has assumed to treat as voidable, transactions deemed binding at law, seem to fall into the following familiar classes: (1) Those in which the submission of the aggrieved party to unconscionable terms has been traced to undue influence.[51] (2) Those in which it has been found due to threats or intimidations deemed in equity sufficient to impair free agency, though not at law amounting to duress.[52] (3) Those in which it has been deemed referable to improvidence under stress of a surprise craftily contrived or utilized for purpose of unfair advantage by the adverse party.[53] (4) Those in which it has been deemed referable to the combined influence of a pronounced weakness of mind short of unsoundness, and of some undue influence or imposition too slight or too slightly evidenced to be relievable except when viewed in connection with such mental weakness.[54]

[51] *Bridgman* v. *Green*, Wilm. 58, S. C. 2 Ves. Sr. 627; *Allcard* v. *Skinner*, 36 Ch. D. 145, 171; *Wright* v. *Vanderplank*, 8 D. M. & G. 137; *Morley* v. *Loughnan*, 1893 1 Ch. 736.

[52] *Bayley* v. *Williams*, L. R. 1 H. L. 200, affirming 4 Giff. 638, 661; *Eadie* v. *Slimmon*, 26 N. Y. 9, 12; *Crawford* v. *Cato*, 22 Ga. 594, 599. In the case first cited, a father who, by implied threats of the prosecution of his son for forgeries he had committed, had been induced to assume the son's indebtedness, was relieved upon the ground that he was not a free agent in estimation of equity, and that unfair advantage had been taken of a gross inequality of conditions.

[53] *Evans* v. *Llewellyn*, 2 Bro. C. C. 150, S. C. 1 Cox 333; Turner, L.J., in *Baker* v. *Monk*, 4 D. J. & S. at p. 392; Lord St. Leonards in *Curson* v. *Belworthy*, 3 H. L. Cas. at p. 751.

[54] *Griffin* v. *Davenilli*, cited in 3 P. W. 130, note 1; *Clarkson* v. *Hanway*, 2 P. W. 203; *White* v. *Small*, 2 Ch. Cas. 103; Wilmot,

(5) Those in which it has been ascribed to a peculiar class incapacity for self-control, due to abnormal modes or conditions of life, as in the case of common sailors,[55] or due to the character of the interests dealt with, as in the case of the future interests of expectant heirs and remaindermen, with their exceptional temptations to improvidence.[56] (6) Those in which the transaction has been deemed so unconscionable as to call for relief, although the only defects in the free agency of the dissatisfied party were such as might be inferred from a combination of some such conditions as his extremely necessitous circumstances, his illiteracy or inexperience, his want of competent advice, and a gross inadequacy of consideration.[57]

This classification discloses at a glance how broadly at this point the two systems stood contrasted, and how completely the conditions of a binding consent in contract or conveyance were in effect revised in equity, by treating it as a vitiating fraud to take unfair advantage of certain disparities in the circumstances of the parties, of which the common law took no account. The practical result was the enforcement over large areas of conduct of more highly moralized standards of fair-dealing, standards which upon their face were as distinctly like equity as they were unlike the old common law.

L. C., in *Bridgman* v. *Green*, Wilm. 61, 63; *Longmate* v. *Ledger*, 2 Giff. 157.

[55] 1 Story's Eq. Jur., 13th ed., sec. 332.

[56] *King.* v. *Hamlet*, 2 My. & K. 465, 480; *Gwynne* v. *Heaton*, 1 Bro. C. C. 1, 9; *Cole* v. *Gibbons*, 3 P. W. 290; *Fry* v. *Lane*, 40 Ch. D. at p. 320.

[57] *Ardglasse* v. *Muschamp*, 1 Vern. 237; *Proof* v. *Hines*, Ca. Temp. Talb. 111; *James* v. *Kerr*, 40 Ch. D. 449, 450; *Baker* v. *Monk*, 4 D. J. & S. 388; *Wood* v. *Abrey*, 3 Madd. 417, 423; *Clark* v. *Malpais*, 4 D. F. & J. 401; *Rees* v. *DeBernardy*, 1896, 2 Ch. 437; *Longmate* v. *Ledger*, 2 Giff. 157, 163.

In all these cases of the taking of unfair advantage of some partial impairment of contracting or disposing capacity, the relief that equity afforded was by enabling the aggrieved party to plead the impairment in rescission or avoidance of the transaction. Although the common law procedure made no provision for rescission or avoidance by judgment, it abundantly recognized the right of a party to rescind or avoid by his own act in cases of actual legal fraud and duress; and a similar right would have been available to one aggrieved by the unfair practices or constructive frauds now under view, had it been the policy of the common law to invalidate for practices of that kind.

The "influences" against the undue exercise of which equity relieved under the first and undoubtedly the most important of the six heads above mentioned, were nearly always influences originating in some relation of confidence. For it was a sweeping doctrine of equity that the existence of a confidential relation between parties at the time of their entering into a transaction with each other opened to the fiduciary opportunities to influence the party confiding in him so unduly as to amount in equitable estimation to an infringement upon his free agency, and that the taking of an unfair advantage of such influence would make the transaction voidable for constructive fraud. The rule was broad enough to cover all relations involving a reposal of confidence, although varying with the degree of confidentiality in some matters of detail unimportant here, such as with respect to the presumptions to be indulged and the burden of proof.

The principle we have been considering has aimed at the prevention of only that particular method of abusing confidence in which it is employed unfairly in misguiding the will of the confiding party. It is now necessary to

notice that this has been only one phase of the still broader equitable conception that under all circumstances it is fraudulent for one in whom confidence is reposed to misuse it in any way in his own interest. In prevention of such frauds the precautionary rule was enforced, that no fiduciary, the word being here used in its broadest sense, should be permitted to place himself in a position where his interest might conflict with his duty.

Among the more valuable applications of these principles were the rules accounting it a fraud for anyone to make a secret profit out of a transaction in which he was acting as agent, trustee, guardian, or in a like fiduciary capacity, or for an agent or trustee for the purchase of property or for its sale to become adversely interested as seller in the one case or as purchaser in the other. The reports show clearly that all of the earlier cases of this description were in equity, and purported to proceed upon distinctly equitable grounds. For a considerable period at least it was true, as remarked by Mr. Evans in his work on agency, that "the confidence reposed in the agent might be abused with impunity in a variety of ways, did not the doctrines of equity intervene."[58]

During the course of the nineteenth century the common law so elaborated its reasoning upon these subjects as to reach results approximately like those of equity, although its method of arriving at them from necessity has been different. The restrictions, such as we have been considering, upon the conduct of fiduciaries arose as developments of equitable theories concerning the reposal and the keeping or observance of confidence and without recourse to the legal principle of contract. In equity for a fiduciary to fall below those standards of conduct was a breach of confidence, and to break

[58] Marg. p. 257.

confidence was a fraud. When the common law undertook, as afterwards it did, to enforce in such situations standards of conduct approximately as exacting as equity's, its only available method of raising the duties which in equitable contemplation flowed from the mere reposal of confidence was to suppose them to have been agreed upon by implication.[59] At law therefore failure to perform such duties was but a breach of contract; and mere breach of contract has not been deemed a fraud.

In considering the sphere and value of equitable leadership along these lines, we must recognize that it introduced, as applicable to the whole range of relations strictly or partially confidential, a new and higher standard of good faith. For while in the ordinary relations of life only ordinary good faith was exacted, relations of confidence were deemed by equity to call for "the most perfect good faith" — *uberrima fides*. The distinction was fruitfully applied in dealing with the relations not only of trustee and *cestui que trust*, guardian and ward, parent and child, attorney and client, principal and agent, but of partners *inter se*, landlord and tenant, principal and surety, mortgagor and mortgagee, and so on indefinitely wherever in the estimation of equity confidence has been reposed.[60]

By familiarizing the popular and the judicial mind with the appropriateness to such relations of a higher than the ordinary standard of good faith, equity manifestly paved the way for the implications subsequently raised by the common law in many such cases of an agreement by the party confided in, that the most perfect good faith should be observed.

[59] Bowen, L.J., in *Lamb* v. *Evans*, 1893, 1 Ch. at p. 229.

[60] Story's Eq. Jur., secs. 307–24.

From this brief review of the principal developments in the doctrine of fraud, they nearly all appear to have originated in equity. The subject seems to be one upon which habitually equity has led rather than followed the law. It is evident that the truth of the matter is, to say the least, very imperfectly expressed by those who claim with Blackstone that "every kind of fraud is equally cognizable, and equally adverted to, in a court of law" as in a court of equity. Upon most points in the doctrine of fraud, harmony between the two systems has been a matter of ultimate attainment rather than an original and constant condition. The harmony, such as there is, signifies generally not that there has been an absence of equitable innovations, but that their occurrence has been somewhat obscured by the common law's gradual concurrence in them. The books afford many evidences that the law was always restive under the imputation of lagging far behind equity in the pursuit of so odious a thing as fraud, and that the feeling often asserted itself that the subject is one upon which, procedure permitting, what is good equity ought to be good law.

CHAPTER VIII

USES AND TRUSTS

Foremost perhaps in importance of all equity's specific substantive innovations, as it was among the earliest and most typical, stands the doctrine of uses and trusts; which in its processes of unfoldment is illustrative of nearly all equitable principles and methods.

At common law, all intentions and attempts to create a use or trust, no matter upon what considerations or by what solemnities, were so nugatory that from a non-observance of the projected use or trust not even a right to damages could arise.[1] The evidences are con-

[1] With those whose theories of equity have led them to depreciate its departures from the law, it has been customary to claim undue significance for the fact that some relations that in a sense are relations of trust, such as bailments and agencies, were dealt with by the law itself. Bailments and agencies are indispensable vehicles of everyday commerce, and to some extent are matters of inevitable and internal development in every system of law; while the uses, passive trusts, and in a less degree even the active trusts exclusively cognizable by the Chancellor are the products, in many respects unique, of our divided jurisdiction; their issuance from a jural matrix essentially different from that of the common law being attested among other ways by their prodigious capacities for evading and subverting the law. If on the one hand it was natural that in its first contact with such uses as were so constituted as to include a duly solemnized agreement on the part of the feoffee to uses or the covenantee to stand seised, the law should have been tempted to award damages for the agreement's breach, it seems equally natural that finally it should have recoiled from enforcing as either a contract or a condition, a kind of agreement which, if habitually performed,

clusive that this was due not to any merely remedial incapacity of the law, but to the disfavor with which it regarded uses and trusts from substantive points of view. It is true that when the Chancellor first undertook the enforcement of uses, the actions upon covenants and assumpsits were not fully developed, especially the action of assumpsit, and it is as easy as it is inconsiderate to exaggerate these conditions of procedural immaturity into the cause of the law's failure to award to the *cestui que use* damages, as for breach of contract, for the disregard of his claims by the feoffee. The backwardness of those actions was largely a symptom of crudeness in the contractual conceptions of the substantive law.

The substantive character of the law's grounds for disregarding uses seems to be verified by the circumstance that every interference of the *cestui que use* with the property or profits covered by the use was esteemed by the law no less wrongful than though no use had been declared, and remedies as freely accorded

would possess a good deal of the capacity afterwards exhibited by the use, for confusing, undermining, and evading the law. The enforcement of uses was a most daring discharge of legally disruptive energy, even for one as little awe-stricken as the average ecclesiastical Chancellor was by the wisdom and symmetry of the common law. Those who think it strange that the common law did not in its own way enter upon the enforcement of uses and trusts, and who can see but a narrow line between uses and trusts on the one hand, and such fiduciary relations as agency and bailment on the other, have not been fully impressed, as it would seem, by the fact above noticed that while within the borders of civilization and commerce the latter are found everywhere, the former, as fruit of juridical development, have prevailed nowhere outside of English equity. Even the isolated and comparatively narrow *fideicommissum* of the Romans ran through the entire Praetorian period without eliciting legal sanctions of any kind, finally receiving its first legal vindication at command of the Emperor. Hunter's Rom. Law, 3d ed., 811.

to the feoffee against him, as against any acknowledged trespasser. When sued as a trespasser on account of profits which he had been permitted to gather in pursuance of the use, he at first was not permitted to prove the use even as an indication that he had acted with the consent of the feoffee,[2] though later he was accorded recognition as a tenant at sufferance. Had the substantive law aspired to the recognition of uses, however seriously handicapped it might have been in affording affirmative relief upon them by want of adequate process, it would not have failed to accord them some slight measures of defensive efficacy in actions of trespass and for ejectment from the possession. To have done so would have been a thoroughly normal course of development, it being common experience for the law to take cognizance of certain forms of injustice for purposes of defense, earlier than for purposes of affirmative relief; often on account of the reluctance of the law to permit the use of its process offensively for unjust ends.

The use's points of incompatibility with the law were that it aimed at carrying substantially an interest in the land to one who was not in on the formality of seisin; that it sought to assure without seisin rights of enjoyment which according to law could be assured only through or by seisin; that it seemed repugnant to the feoffment; that it was cross-grained to the law, and unadaptable to the law's form and classifications, being neither a *jus in re* nor a *jus ad rem*, and partaking too much of conveyance to be treated as contract, and too much of contract to be classed as conveyance. It was largely in deference to such formal considerations as these that the law was content to condemn the use to utter futility, despite the injustice that would ensue.

[2] Year Book 4 Edw. IV, 8, 9. See Digby's Hist., 337.

But the Chancellor, who unquestionably took it as his province to mitigate the law's hereditary servitude to forms, was less sensitive to these scruples. His resolution to enforce, against the feoffee to uses or the covenantor to stand seised, the conscientious obligation that arose by sheer force of personal confidence reposed, when attended by valuable or meritorious considerations, was made in sweeping disregard of all points of legal form. Mr. Spence's estimate of it as "the most violent interference with the law exercised by the Court of Chancery" is not an extravagant one.[3] It set on foot a movement destined to assume unforeseen and truly revolutionary proportions. It was a wedge which, throughout the centuries that were consumed in driving it through the law, was slowly shattering legal principles on every hand. Largely through its agency, for example, the dominant principle of seisin was practically worn away, and our old law of possessions almost imperceptibly worked over into a true law of ownership. For much of both convenience and inconvenience ownership was riven into two separate elements, the formal, and the substantial or beneficial; a new system of conveyance ensued; many of the sharp contrasts between contract and conveyance, and also between realty and personalty, were considerably abraded; a category of far-reaching implied, resulting, and constructive uses and trusts ultimately arose, and a class of formless and hypothecary liens with an equally marked prehensile capacity. The principles of implied and constructive use and trust were widely and systematically utilized by equity as tentacles for drawing into its control relations and transactions with which otherwise it might have hesitated to deal.

[3] 1 Eq. Jur. 435.

It is not to be supposed that there ever prevailed any estimate of the Chancellor's powers that would have justified him in appropriating at a leap all the large tracts of jurisdiction with which the principle of the use and trust was ultimately associated. These large results were the outcome of a long succession of comparatively slight advances, each of which brought the Chancellor up to a new and more advanced base of operations.

It is germane to our inquiry to notice the course and methods of this development far enough to bring to mind the varieties and extent of its reformatory bearings upon the law. While the Chancellor's process of personal compulsion was an indispensable factor in it, as we have seen it to have been in the specific performance of contracts of which uses and trusts may be regarded as the forerunner, it will appear as clearly here as there that credit for the course and extent of development must be divided between the efficiency of equity's process and her more than legal eagerness to gauge transactions by their moral contents in comparative disregard of forms. It should also be noted here that though, as already remarked, the enforcement of uses and trusts was strikingly illustrative of equity's partiality for considerations of substance in their competitions with matters of form, they often are evolved or reinforced by other equitable principles. For besides being in many instances raised by acts actually or constructively fraudulent,[4] they seem often

[4] It is not improbable that if the truth could be known it would be seen that the doctrine of uses sprang from equitable notions of fraud. Confidence may have figured only in so intensifying the relation between the parties as to make a breach of it seem fraudulent; just as at a later day the theory of fraud led to an extension of the liability to the less deeply implicated person who took the legal title with notice of the use.

akin to the principle upon which equity has assumed to correct the law's imperfect correlation of burdens and benefits; they certainly are an instance of equity's preventing an unconscientious use of a legal right; and they might even derive credit from the theory that they relate to a matter concerning which the law was silent, thus regarding them as Lord Bacon did, as "things not prohibited by the law though they were not remedied by the law." A multiplicity of grounds for a particular equity is so common as perhaps to be the rule rather than the exception, and it may be remarked once for all that no attempt will be made here to inquire nicely in such cases the relative influence of the several contributory principles. It is enough for our purposes that a given equity appears to have proceeded from any one or more of the trunk principles listed at the close of Chapter V with the assertion of which, in emergencies, equity is here accredited; principles from which it is supposed also that approximately all equities substantive in their nature may fairly be regarded as having been derived.

All are agreed that when the Chancellor first undertook the enforcement of uses, it was only as between the original parties without any idea that the use should follow the property in its devolutions. It was only one in whom a strictly personal confidence had been actually reposed, whose conscience was heavily enough charged to justify the Chancellor's interference. But the burden upon the conscience of such a one seems to have been accentuated by the churchly Chancellors with religious fervor. The recognized probability is that the use was enforced in the ecclesiastical courts earlier than in the Chancery, and earlier still through the confessional; and as its earliest employment upon a large scale seems to have been in the interest of religious establishments in

evasion of the statutes of mortmain, it altogether must have smacked as much of religion as of law upon its advent into Chancery. Its recognition there appears to have proceeded as unmindfully of legal classifications and of all forms of legal solemnity and authentication as might have been expected in a religious invasion of the law's domain. In its first stage, it was more like a contract right than like an estate. But there seems to be no evidence that it was conceived as either contract or conveyance, or that any attempt was made to impress upon it the characteristics of either. Even a married woman or an infant could be bound by a use, though without contractual capacity. A corporation though with capacity to contract could not become bound by a use owing to the absence of a personal conscience. Although a consideration was necessary to raise a use as it was to a contract, it need not be a legal or valuable consideration but might consist of the merits of a close kinship. The benefit of a use, unlike that of a contract, could be conditioned to vest in one not otherwise a party to the transaction, so as to entitle him to relief in his own name. It was always true, in other words, as said in borrowed language by Lord Bacon, that "a use in law hath no fellow; meaning that the learning of uses is not to be matched with other learnings." From the first the use was an institute of its own kind. It was the product of a moral force which the Chancellor deemed intrinsic in a relation of confidence.

Had the Chancellor continued, as he began, to enforce uses and trusts only against those whose moral duty was accentuated by the fact of there having been actually reposed in them a strictly personal confidence, the doctrine would never have attained more than a small fraction of the importance that it did. Its extreme significance has arisen from the fact that from being a minis-

trant to a single equity, confidence, it has developed through an elaborate system of implications into an agency for reinforcing practically all "equities," using the word in its technical sense, to which its principle can bring needful support, and for giving play also, in a variety of situations, to equitable tendencies and conceptions which, in the given circumstances, the Chancellor might not have assumed to enforce against the law at all had not the door of trust implication been open so conveniently before him.

In carrying out these extensions of the trust principle, the theory resorted to in minimization of the appearance of change was that the new trusts like the old rested upon a reposal of confidence, though it was said to be a confidence impliedly reposed by the equitable law rather than by an individual. This was very much as though extensions of the doctrine had been explained as resting upon conclusive fictitious presumptions that personal confidence had been actually reposed; and that, in its turn, would be equivalent to saying that personal confidence had ceased to be necessary as the basis for a trust, as in truth it had.

For by the time of Lord Hardwicke at any rate, and no doubt much earlier, it was deemed permissible to say, as he did, that "equity always considers who has the right in conscience in the land, and on that ground makes one man a trustee for another." [5] His reference of course was to the standard conscience of the King or of the realm.

Mr. Digby's statement of the principle is "that *whenever according to the principles which regulated the action of the Court of Chancery as it existed before Nov. 1, 1875,* [date of the Judicature Act] *it would be inequitable from*

[5] *Willoughby* v. *Willoughby*, 1 T. R. 763.

circumstances of fraud, mistake, or otherwise, for the legal owner of the land to be also the beneficial owner, the legal owner will be held to be a trustee for the person who in equity is entitled to the lands." [6]

Or perhaps best of all, as put in Hill on Trustees: "Whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment." [7]

Approximately these statements seem to be correct; and they illustrate most persuasively that however closely the trust doctrine may have been implicated with the process of personal compulsion, the clue to this sweeping employment of it for so pervasive a remoralization of property law lies in the more advanced views entertained by the Chancellor of the extent to which rigid rules and forms of law could be profitably tempered by new infusions of ethical principle.

Of the implied trusts thus raised, the term being here used as inclusive also of the trusts commonly called constructive, a majority may be regarded as secondary or auxiliary to other well-defined underlying equities; as where one who obtains a conveyance of property through fraud or mutual mistake is charged as trustee for the vendor. Our principal interest in the details of such supervening trusts is to notice to what extent their various underlying equities have involved departures from the substantive common law. This is gone into

[6] Hist. Law of Real Property, chap. 7, sec. 4, p. 371.

[7] Hill on Trustees, 116.

elsewhere under the headings of those several equities. But although practically every implied trust (apart from those raised in aid of common law rights) has its root in one or more of the equitable trunk principles or tendencies of thought that were approximately enumerated at the close of Chapter V, there were many instances where the moral right in furtherance of which the trust was implied had not developed into a recognized equity, and perhaps never would have done so had not a trust been implied in its aid. For as we have seen, and it was especially true in connection with the competitions of form and substance, equity cherished certain tendencies and modes of reasoning at variance with those of the law, which it would assume to enforce not uniformly or as of course, but only when the moral pressure was extreme or only so far as special pretexts could be assigned for the interference; often only when a correction of the law could be made to seem like only a supplementation of it.

As an agency for thus giving complete utterance and validity to such half-articulate aspirations of equity, the implied trust was admirable. The power of the Chancellor to enforce uses and trusts was early and firmly established, and carried with it the power to determine under what conditions they should be deemed to arise. Like the old physician who felt sure-footed if he could only throw his patient into fits, for which he had infallible remedies, the Chancellor had any transaction well within his jurisdiction and control which he could manage to throw into the form of a trust.

Another feature of trust implication that made it an efficient instrument for drawing new subjects within the jurisdiction was the color it was calculated to give to the theory that it stood toward the law in the relation of a supplement only, however corrective its effect might

really be. It lent a certain degree of plausibility to the claim that nothing was detracted from the law although something was added to it.

How much force there is in these points cannot be better indicated than by a few illustrations. And first we may notice equity's method of working out the disfavor with which it regarded the rule of English law, never generally recognized in this country, that a person named as executor took the absolute ownership of the personal estate, subject only to payment of debts and legacies. Quite in keeping with his habitual valuation of intent, the Chancellor considered that this technical and oppressive rule of law should not prevail where it could be gathered from the context of the will or from circumstances that the testator entertained a contrary intention. It is probably a matter of doubt whether, had there been no other recourse, the Chancellor might ultimately have made bold avowedly to subordinate the law to the contrary intention of the party. Probably not. Yet having in mind what the later Chancellors did to the law respecting the merger of estates, we are bound to admit that this is not certain. But however this may be, it was easier to move under secure cover of the power to raise trusts, and it was also propitiating to leave it claimable that the law remained intact The executor was therefore conceded to take the legal title but held chargeable as trustee for those who would have taken in case of intestacy, and microscopic search was habitually made for grounds of an inference adverse to the law.

It was by the same method that the law of joint tenancy was undermined. In order to afford partial relief against the rule of survivorship incident to that tenancy, it was ultimately held that in equity a mutual intention, circumstantially evidenced, to hold without right of sur-

vivorship should be carried into effect by charging the survivor as trustee for those who would have succeeded to the interest of the deceased cotenant had the tenancy been in common. Thus again intention was enabled by equity to prevail over a fixed rule of law.[8]

Through this same door also, equity introduced the separate property of married women. Although the common law effect of a conveyance of property to a wife was to vest it in her husband, no matter how distinctly declared by the conveyance to be for her separate ownership or use, equity ultimately assumed to execute the intentions of a grantor to convey for the separate benefit of a wife, by fastening upon the legal title which the law carried to the husband a trust in her favor.[9]

It will be observed that in such cases as these the implication of a trust, where none was intended, in order to humor a legally inoperative intention of the parties to exempt a particular property from a fixed oppressive rule of law, worked virtually, *pro tanto*, the reversal of a legal rule which had no sort of relation to any of the law's processual inefficiencies.

So the method adopted by equity to give utterance to her dissent from the somewhat technical rule of the common law which disabled a party from taking advantage of a contract made for his benefit by another, was to imply that by the latter the contract was made in trust for the former.[10]

So upon contract for the sale of an ordinary chattel, though it is not specifically enforceable, yet if the purchase price has been fully paid so that there is danger

[8] *Lake* v. *Gibson*, 1 Eq. Cas. Abr. 294; *Lake* v. *Craddock*, 3 P. W. 158.

[9] *Bennet* v. *Davis*, 2 P. W. 316.

[10] *Gregory* v. *Williams*, 3 Meriv. 589, 590.

that the purchaser, having borne the burdens of the transaction, may fail to reap its benefits, equity will imply a trust in his favor.[11]

So even in the case of theft, equity will charge the thief as trustee of the stolen chattels, in order that the owner may be able to pursue the property through changes of form as permitted by equity in case of the misappropriation of trust property.[12]

And where a condition subsequent was void at law because the party to perform and the party to be benefited by the breach were one and the same person, it was held good in equity "as a trust devised to go with the lands," so that performance was decreed in favor of the party for whose benefit the condition was intended.[13]

According to the original conception of the use it bound not the land, but only the conscience of the person actually trusted. The beneficiary's right in equity was to have a decree compelling the owner of the property to perform a personal conscientious and confidential duty with respect to it. So purely personal was his right at its inception — so free from the characteristics of an estate or ownership — that it was neither inheritable, assignable to another, nor enforceable against any successor to the legal title. While the property was subject to execution for debts of its legal owner, to forfeiture for his crimes, to escheat upon his death without heirs, to all the feudal incidents of his tenure, to descent to his heirs without interception by will, to dower for his widow, and to curtesy in case of a surviving husband, the beneficiary of the use or trust was

[11] *Pooley* v. *Budd*, 14 Beav. 34.

[12] *Newton* v. *Porter*, 69 N. Y. 133, 139.

[13] *Smith* v. *Atterby*, 3 Ch. Rep. 93.

accredited with nothing to which any of these incidents of ownership could be deemed applicable. Indeed it was mainly due to the fact that while assured, though somewhat precariously, of the benefits of ownership, the *cestui que use* had nothing to which the ordinary burdens, limitations, and liabilities of ownership could attach, that the early use obtained so great a vogue as to involve, as is generally supposed, more than half the lands in England in scrambles for the evasion of first one and then another of these incidents of ownership, and for the circumvention of mortmain statutes.

But the rudimentary hold of the beneficiary upon the conscience of the trusted feoffee was destined to develop into an equitable estate in the trust property; the trust transaction, originally an analogue of contract, was to take on the qualities of a conveyance. It is true there has always been a question just how seriously the doctrine of equitable estates is to be taken. There is no lack of contention that even in its present stage of maturity the equitable estate of a *cestui que trust* is an estate only by way of misnomer; that it is after all but a right *in personam* verbally disguised. The most insistent advocates of this view, though by no means its only advocates, have been those expositors of equity who have stood definitely committed to the processual theory of the jurisdiction, and consequently to the notion that substantive equity is not inconsistent with law.[14] The bias derived from that theory seems quite

[14] Professor Langdell's views, already noticed, that equity accredits a *cestui que trust* with an estate only by figure of speech, and concedes ownership to an innocent purchaser for value of the legal title, in confession of its incompetency to create a right *in rem*, are substantially paralleled in Professor Maitland's lectures, where the proposition that an equitable estate is only a right *in personam* is much labored. Thus at p. 32 it is said: "But fourthly, the Chan-

visibly to have made such persons reluctant to interpret sympathetically the avowed doctrines of equity upon this subject. The conclusion that equitable estates are proprietary rights does not fit into, but tends to discredit, the theory of consistency between substantive equity and law. So long as the hold of the *cestui que use* was conceived as being only upon the conscience of the trusted feoffee, a certain semblance of consistency with law could be imparted to it by reasoning, though fictionally, that the legal estate or right of the feoffee was not subtracted from by restricting the uses to which he should be at liberty to put it. But when the thing to be reckoned with is conceived as an equitable interest or estate actually and adversely vested in the beneficiary of the use or trust and divested from the feoffee, the strain on the fiction is greater than it can bear.

The reason generally assigned for denying the proprietary character of an equitable estate, is that because vulnerable to the claims of the purchaser for value and in good faith of the legal title it cannot be ranked as good against all the world. Yet all agree that a right may be proprietary although under special circumstances it may be divestible by the wrongful conveyance or act of another than the owner; as in case of sale in market overt, or of resale to an innocent purchaser by the grantor in an unrecorded deed, or in case of the purchase in good faith of a negotiable instrument. Professor

cellor cannot create new rights *in rem*. So to do would be not to supplement but to overrule the common law." And at p. 112: "Think for a moment what such a conflict would have meant, one court saying that A is owner, another that X is owner — it would simply have meant anarchy." But fictions aside, why any more anarchy than for one court to declare the feoffee entitled to the profits, while another declares the *cestui que use* entitled to them?

Langdell pronounced such cases as these distinguishable from that of an equitable owner without explaining how. Professor Maitland's explanation of the supposed difference is as follows: "But really there is a marked difference between the two cases — in that of the sale in market overt the buyer gets ownership, but we do not conceive that he gets it from the seller, for the seller never had ownership; while the rule about the effect of a purchase in rendering equitable rights unenforceable is based on this, that the trustee has ownership and transfers it to the purchaser, and that there is no reason for taking away from the purchaser the legal right which has thus been transferred to him." [15]

It thus becomes plain that the fact of the acquisition of complete ownership by an innocent purchaser from a trustee can never be citable as proof that the right of the *cestui que trust* is non-proprietary, since whether proprietary or not the rights acquired by the innocent purchaser are the same. The only question in such a case is whether it is from the trustee or from the *cestui que trust* that the beneficial interest is carried to the purchaser by the trustee's deed, and that is a question upon which no light is shed by the fact that the purchaser has acquired a good title. If, contrary to Professor Maitland's assumption, the ownership of the beneficial interest is in the *cestui que trust* as equity so manifoldly has declared, then it is from him that it is carried to the innocent purchaser by the wrongful conveyance of the trustee, in general analogy to the other above-mentioned instances of a similar result, although under conditions differing somewhat from all of them as they also differ from one another.

We shall have occasion to notice further on that the nature of the *cestui que trust's* right or interest is a subject

[15] Maitland's Equity, 143.

upon which equity reversed her attitude late in the seventeenth and early in the eighteenth century, when she began to credit the *cestui que trust* with an equitable estate and when innocent persons ignorant of the trust, who as wife, husband, or creditor of the trustee succeeded to his title by operation of law, were held to take only the formal title *because that was all that in equity he had*, and because in conscience they had no sufficient reason for claiming to have acquired more than he had. It is from the *cestui que trust* therefore that the beneficial ownership is withdrawn to satisfy the deserts of one who has purchased the legal title while innocently ignorant that the beneficial estate had been separated from it.

But irrespective of the force of these particular analogies to purchasers in market overt and the like, the notion that in order to be proprietary a right must be good against all persons is utterly indefensible. Rights good against everybody are insignificantly few. Despite the improvident wording of more or less current definitions, the criterion of a proprietary right is that it shall be good against persons generally — not that it shall be good universally. The intricacy of human relations exacts its tribute of exceptions here as it does everywhere else. Take for example the fee simple ownership of land. Though good against the world generally, it may be voidable by an infant under whose deed it was derived, or by the grantor from whom it was deceitfully purchased, or by the creditors of a grantor whose conveyance of it operated to defraud them. The rights of control and user incident to ownership may be curtailed in favor of an adjacent owner claiming a right to the support of his soil, or in favor of a more remote neighbor suffering from a nuisance. Or the owner's rights of disposition, however generally absolute, may be scaled down as against his creditors, or as against his wife

and her inchoate rights of dower. If it is an ownership derived through adverse possession, however generally binding, it may not prevail against the claim of one who has been laboring under legal disability; if acquired by an alien it may be good against all but the King or the State. And so on indefinitely.

"My right," says Sohm, with reference to his right as proprietor, "excludes everyone from the use and disposition of the thing who has not himself some special right available as against me." [16] And this is about all any proprietor can say. Mr. Austin is one of those distinctly recognizing the accuracy of the position here taken. He defines a right *in rem* as one "availing against other persons universally or generally." [17] The naturalness of the distinction between personal and proprietary rights seems to be attested by the widespread recognition to which it has attained. That it is nevertheless vexatiously elusive when sought to be applied in detail is evident from the fact that no two systems of law entertain exactly the same conception of it. In fact we must go further and with Ortolan admit it to be a subject upon which there are "almost as many opinions as there are writers." This absence of absolute and generally accepted standards makes it necessary to concede to each system of law, without impeachment of legitimacy, reasonable latitude for peculiarities of view. This is especially so in reckoning with equitable conceptions, since upon this subject, as upon others, it is with reference to substance relatively unshackled from forms and technicalities that equity purports to speak.

The equitable estate undoubtedly bears some permanent marks of the pit of purely personal right out of which

[16] Sohm's Inst. Rom. Law, pp. 307–9. And see sec. 62.

[17] Austin's Lectures, secs. 518, 510.

it was digged, as well as of the fragmentariness of the jurisdiction by which it has been molded. The extent, for instance, to which ordinarily when possible it must be realized indirectly through the trustee and through personal remedies against him suggests some impairment of that directness and immediacy of relationship which ordinarily prevails between an owner and his property. Originally, no doubt, these remedial indirections did betoken an absence of ownership in the beneficiary, and proceeded upon the theory of complete and undivided ownership in the feoffee to uses or the trustee, through whom for that fundamental reason all redress against third persons interfering with the property must be sought. But manifestly this is no longer true. As will be noticed later in this chapter in discussing trespasses and disseisins, the evidences are abundant that so far as equity now requires an equitable owner of property to seek redress through the trustee for injuries done to the property by strangers, it is in the nature of a mere act of deference to the common law to avoid the unnecessary withdrawal of controversies from that jurisdiction, and not at all because of any supposed lack of liability of the wrongdoer directly to the equitable owner — a liability which, as there will be pointed out, springs into plain view whenever for almost any reason relief through the trustee becomes unavailable.

No appreciative estimate can be formed of just how much equity means by her doctrine of equitable estates, without something like a fairly sympathetic survey of her entire movement toward that doctrine as a goal, bringing into their mutual relations changes of view often obscure, fiction-veiled, or only half avowed, and widely separated from one another in point of time, and giving due interpretative weight to the urgent considerations of justice and public policy by which equity was driven to substi-

tute for her early idea of the beneficiary's right a new and less abusable and more workable conception. For our present purposes such a survey will be found to have the added interest of illustrating still further how constantly equity's distinctive modes of reasoning co-operated with her peculiar process in the evolution of doctrine, and how large is the allowance which in any just estimate of the Chancellor's ultimate range of action must be made for the cumulative effects of his successive innovations.

The factors that will be found principally instrumental in accomplishing the transition are: (1) Equity's practice of compelling the specific performance of duties. (2) The peculiar attention to the substance of transactions, which at the same time facilitated the conception of an ownership without the forms of ownership and led wherever possible to anticipate, through equitable construction, the actual performance of duties by accounting as done what ought to be done. (3) The advanced conceptions of fraud actual and constructive, as reflected in the doctrine of notice, and the gradual enforcement of trusts against third parties upon grounds less cogent than notice and fraud. (4) The insufferable abuses that followed in the train of the first notion of the beneficiary's right. How well the first two of these factors are adapted to supplement each other in fostering the idea of an equitable estate has been noticed in Chapter V in connection with the specific performance of agreements. The points covered there should be borne in mind here.

Although at first the *cestui que use* had only a right to a subpoena or right of action, his peculiar remedy by which, upon peril of imprisonment, he could compel the feoffee to uses specifically to perform his duty of yielding up the profits of the land, or of making over the title to it, or of defending it from wrongdoers, gave him, *as against*

the feoffee, an actual hold upon the land, which sharply distinguished his right from the ordinary right *ad rem*, enforceable only by award of damages for its breach, and which proved to carry with it a marked susceptibility to enforcement even as against third parties. The flaw in the right of the *cestui que use* as at first conceived was that interests in the property might be acquired or held by third parties whose consciences would not be bound by the obligation of confidence that rested upon the feoffee. The persons whose interests might thus come into competition with the rights of the *cestui que use* may be grouped about as follows.

First there were those claiming under and by act of the feoffee, *i.e.* the subsequent purchaser from him with notice of the use, the gratuitous successor with notice, the gratuitous successor without notice, and the purchaser for value without notice. Then the heir of the feoffee taking under him by operation of law, but perhaps in a class by himself as taking to some extent rather as representative than as successor. Then the others who took under the feoffee by operation of law — his or her husband or wife claiming curtesy or dower, his creditors claiming under execution, King or lord claiming under forfeiture. Then King or lord claiming under paramount feudal title as escheat or as other feudal due or incident. Then trespassers upon the land and persons claiming under new and independent title as disseisors, abators, and intruders.

Among the earliest of these to be discomfited by the use was the purchaser of the legal title with notice of the use, who was held bound by the use as early as 5 Edw. IV. For this there appear to have been two about equally available grounds. By Lord Bacon its theory is supposed to have been that even then the property was conceived to be the beneficiary's, in such a sense at least that from

equity's point of view it was a fraud knowingly to buy it out from under him: a moral refinement which he sharply emphasizes as an advance beyond the ethics of the common law.[18] The evidences are abundant, however, that it was only in a popular or moral sense, and not in any juridical sense, that he supposed the property to have been conceived as the beneficiary's. The theory of equitable estates, as will be noticed presently, was not known even in Lord Bacon's age. By Lord Coke the force of the use against a purchaser from the feoffee with notice is explained in his argument in *Chudleigh's* case[19] as due to an enlargement of the notion of confidence, upon the principle that as the confidence "arose from the notice which was given to the feoffee of the use," it should be regarded as having been reposed in all feoffees taking with notice. The two theories of the purchaser's liability were thus only two reasons for holding his conscience bound. The case of one taking with notice and as a volunteer fell still more obviously within the same principle.

A point of more crucial interest was presented by the case of one who succeeded to the interests of the feoffee

[18] Lord Bacon's language is as follows: "Which prove that if the feoffee sell the land for a good consideration to one that hath notice, the purchaser shall stand seised to the ancient use; and the reason is because the Chancery looketh further than the common law, viz.: to the corrupt conscience of him that will deal in the land knowing it in equity to be another's." Bacon's Law Tracts, 312. This should be read in connection with such passages as that on p. 150 of the Law Tracts, where Lord Bacon says: "I and you agree that I shall give you money for your land, and you shall make me assurance of it. I pay you the money, but you make me no assurance of it. Here, although the estate of the land be still in you, yet the equity and honesty to have it is with me."

[19] 1 Co. Rep. 120.

gratuitously and without notice of the use. His case was disposed of upon the ground, as tradition has it, that a volunteer's knowledge of the use would be conclusively presumed. By this fictitious imputation of bad faith to the innocent volunteer it was possible temporarily to account for the subordination of his interests to the use, upon the old theory of a personal and conscientious obligation. The fact remained that he had in truth acquired title without taint of unconscientious conduct, and that if he had not a right to enjoy the property it would ultimately appear to be because his grantor, the feoffee to uses, had not the rights of enjoyment to convey. The binding of the innocent volunteer in the reign of Edward IV may be justly regarded therefore as the earliest manifestation, though veiled, of the then vague feeling which between two and three centuries later became articulate in the doctrine of equitable estates.

As to the purchaser in good faith and for value from the feoffee, it was early and necessarily held that as his equities equaled and neutralized those of the *cestui que use*, he must be accorded in full the benefits of his legal title.

The reign of Edward IV thus saw it settled that except as to the innocent purchaser for value all persons taking under *and by the act* of the feoffee to uses took subject to the use. During the same period, after some vacillation and presumably upon the special ground of his representative character as already suggested, the heir of the feoffee was singled out from those claiming under him by operation of law and held bound by the use.[20] This is as far as the binding force of the use or trust was carried prior to the Statute of Uses of 27 Hen. VIII.

[20] Digby's Hist. Real Prop., p. 324.

Except through the legislation soon to be mentioned, the husband or wife of the feoffee, his creditors, the King, the lord, the disseisor, were not bound by it, but all could treat the property as the feoffee's, while correlatively no one standing toward the *cestui que use* in any of those relations could treat the property as his. Concurrently with the developments thus noted, the use had become assignable and descendible, as it seems always to have been devisable. Qualities appear to have been imputed to it somewhat capriciously without consistent adherence to the analogies of either real or personal property. As said in the Touchstone, borrowing from *Chudleigh's* case, "these uses to some purposes were reputed in law as chattels and therefore were devisable by will; and to some purposes as hereditaments and a kind of inheritance of which there was a *possessio fratris;* and to some purposes neither chattels nor hereditaments, for they were not esteemed assets in the heir or executor." The rule of inheritance whether general or exceptional that was applicable to the particular land was also applicable to the use. In the use there might be the same present and future and entailed estates as in the land. But before the Statute of Uses, and indeed for a long time after it, it was nowhere assumed that the *cestui que use* had an estate in the land, or that by the creation of the use the beneficial elements in the ownership of the land had been detached in any juridical sense from the formal elements. The books of even as late an age as that of Coke and Bacon will be scanned in vain, it is believed, for traces of such a doctrine, if we except the one rather equivocal expression of Lord Bacon already referred to as probably not intended to bear that meaning. By Lord Bacon himself a use is described as "but a thing in action," as "but a right," and as something that "seemeth to be a heredi-

tament in the Court of Chancery."[21] He notes that in the time of Henry VIII just before the Statute of Uses, "they began to argue that an use was not devisable, but that it did *ensue the nature* of the land." Indeed, how far the use did "*ensue the nature of the land*," *i.e.*, how far its qualities were determinable by analogy to land law, was the storm center about which contention raged throughout the century toward the middle of which the Statute of Uses was passed. That the use was an estate in the land was not broached. At the most it was a nondescript hereditament, not in or issuing out of the land, but hanging somewhat *in nubibus* as a thing collateral to a particular estate in the land. The beneficiary had come to be thought of as having an inheritance in the use, not in the land. Nor is there any lack of evidence that this protracted abstention of Chancery from the doctrine of equitable estates was studious. The Chancellor lagged deliberately behind forerunning popular and legislative conceptions upon the subject, presumably because of his old-time definite commitment to the theory that a use was a right *in personam*, to which theory he was still consistently adhering except as against the heir and the innocent volunteer, and because doubt may well have arisen whether the creation of a novel type of estate in land was within the range of his powers. And in fact to make it seem permissible an urgent moral necessity,

[21] Bac. Law Tracts, 313, 315. So, Lord Coke's definition of a use as "a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in Chancery," seems to have been so framed as carefully to exclude the idea of the use being either a corporeal estate inherent in the land, or an incorporeal right issuing out of it.

the convergence of many different lines of preparatory or contributive principle, and the general ripening influence of a good deal of time were probably indispensable.

Of the thirteen statutes concerning uses found by Lord Bacon to have preceded the statute of 27 Hen. VIII, he notes accurately that every one was directed against the *cestui que use*,[22] in the sense that it sought to prevent some form of law evasion by treating him as for some particular purpose as though the owner of the property. Thus, of such statutes, three aimed at subjecting the use to the claims of certain of the beneficiary's creditors, three at relieving lords by subjecting the use to certain feudal dues and incidents as though the beneficiary were tenant of the land, one at giving remaindermen an action of waste against the beneficiary of a particular estate as though he were its owner, one at making the beneficiary of the use a good tenant to the praecipe, one at authorizing a formedon against him, and one, 1 Ric. III, c. 1, at effectuating conveyances of the land made by the beneficiary without the concurrence of the feoffee. Even this last-mentioned statute was not treated as creating or recognizing in the *cestui que use* an estate in the land, but was uniformly characterized as conferring "a *power over* the land."

It will be observed that down to the statute of 27 Hen. VIII all the juridical developments undergone by the use — its accruing qualities of devisability, assignability, and heritability, and its gradually accumulated force as against various successors of the feoffee claiming under his act — had tended to perfect the use as an agency for permanently garnering the benefits

[22] Bac. Law Tracts, 319–24.

of ownership without subjection to many of ownership's liabilities or its more or less burdensome incidents, such as hazards of forfeiture to the King, liabilities to feudal dues and escheats to lord and King, and liabilities to creditors or to husband's or wife's claims to curtesy or dower. In other words the whole juridical tendency had been to mature the use merely as an instrument of law evasion. Although the resulting abuses and evasions had been partially remedied by the piecemeal legislation already noticed, they still proved to be intolerable, and in order to reunite the detached benefits and burdens of ownership, it was enacted in substance by the Statute of Uses of 27 Hen. VIII that where any person stands seised of lands to the use of another, the person having the use shall henceforth be seised of the land in such like estates as he had in the use; so that the estate that had been in the feoffee to use shall be henceforth deemed in him that had the use.[23] By thus carrying the feoffee's estate to the use, the latter was reinforced into a legal estate in the land, and incidentally the creation of a use became a new and standard method of conveying a legal title or transferring the seisin without livery.

Thus, without arriving at the doctrine of equitable estates, was closed the first of the two great periods into which, by the Statute of Uses, the history of the trust principle was divided. The fact that it was not until a later date than this that the beneficiary was accredited with an equitable estate in the land has not been reckoned with as constantly as it should have been. There is no more effectual method of confusing the whole subject than by viewing it in disregard of its chronology. If equity has declared of the beneficiary's right both

[23] For the statute in full, see Digby's Hist., 345.

that it is not and that it is an estate in the land, it is important to know whether it has been by way of alternating expressions of contradictory and mutually discounting views—oscillations due to confused thought—or whether, we are dealing with the well-defined, normally successive conceptions of an earlier and a later age, the former of which, after centuries of experience, was deliberately although gradually abandoned in favor of the latter.

It will be recalled that the Statute of Uses, although upon its face it seemed calculated to make the use and the legal ownership, or, in the language of that age, the possession, inseparable, really left three openings for a second growth of the trust principle. For first it was naturally enough held by the law courts that the statute applied only to such uses as were recognized by the Chancellor. He had always refused to recognize a use limited upon a use, as where land had been conveyed to A for the use of B for the use of C; upon the not unreasonable ground that the second use was repugnant to the first. By the law courts the statute was therefore held to carry the title no further in such a case than to the person first named as entitled to the use. But after the statute had converted the declaration of the first named use into a conveyance of the legal title, the use secondly named was no longer any more repugnant to the first than the limitation of any single use was repugnant to a feoffment. Thus after the statute one to whom was limited a use upon a use stood in exactly the position of the *cestui que use* to whom it was the legislative intention to pass the whole loaf of legal title, and yet through an odd combination of unforeseen conditions he would be deprived even of the half-loaf that had been the old equitable allowance to the *cestui que use*, unless equity should reinterpret his status in the light of the statute and relieve him as one who by

strange adventure had been found standing in the old shoes left vacant by the *cestui que use*, upon the latter's legislative translation into legal owner. As ultimately the Chancellor did afford such relief, the statute was largely undone; since in order to separate the use from the legal ownership contrary to the legislative design it was only necessary to limit a use upon a use. It was held secondly that the statute was aimed at passive uses, and that it had no reference to special or active trusts in which the trustee was invested with powers and duties of management over the estate; and thirdly that it was inapplicable to a use declared upon a term of years, as there was no "seisin" of such a term within the meaning of that word as employed in the statute.

The equitable rights arising in these various ways despite the statute, to distinguish them from the uses executed by the statute were generally called trusts and proved to be of obstinately debatable character. It was not only that they inherited all the ambiguities of the use to which they were so closely akin. Should they be conceived as uses were at a correspondingly early stage of their development, or as uses were at their maturity? Or should both these standards be more or less departed from in order so to shape the new trusts as to avoid the capacities for law evasion which experience had shown to be intolerable in uses?

At first some points seem to have been scored by a reactionary tendency to assimilate the new trusts to the earliest conception of a use. As late as 42 Eliz. and even well into the reign of James I, they appear to have been deemed so strictly things in action as to be unassignable.[24] Of the statutes prior to that of 27 Hen. VIII which as already noticed had aimed at curing evils inci-

[24] Sir Moyl Finch's case, 4 Inst. 85.

dent to uses, several were held inapplicable to the new trusts; such as that of 1 Ric. III, c. 1, validating conveyances of the land by the *cestui que use*,[25] that of 19 Hen. VII, c. 15, subjecting uses to execution, and that of 26 Hen. VIII, c. 13, making them forfeitable for treason.[26]

It seems to have been as late as Charles II, a century and a third after the Statute of Uses, before conditions ripened for carrying the law of trusts to a point materially more advanced than had been reached by the law of uses. From the opinion of Lord Hale in *Pawlett* v. *Atty. General*,[27] it appears that in 1667 it had become settled, contrary to the old rule respecting uses, that the widow of a deceased trustee would be bound by the trust. The old rule had been that the surviving wife or husband of a trustee should not be so bound, because "the law gives them their estates in consideration of marriage, and they are not in, in privity of estate." The standard of privity was now so changed that the widow was deemed to come in in the *per* rather than in the *post* as formerly.[28] More significantly still, it was tacitly assumed that because now in the *per* the widow was bound as matter of course, without adverting to her knowledge or ignorance of the trust, although under the law of uses even one in the *per* was not bound by the use unless chargeable with notice of it actually or presumptively. Between tenant in dower and tenant by curtesy Lord Hale in the *Pawlett* case had drawn an inscrutable line, leaving the latter still in the *post*. At a not very distant subsequent day,[29]

[25] 1 Spence's Eq. Jur., 500.

[26] Lewin on Trusts (12th Eng. ed.), 6.

[27] Hard. 465, 469. See also *Noel* v. *Jevon*, Freem. 43.

[28] As to distinction between those in the *per* and those in the *post*, see 4 L. Quar. Rev. 362.

[29] It must have been prior to 1670, for as stated by Lord Mansfield in 1 Eden at p. 224, it was as far back as that that curtesy was

under circumstances difficult to determine, tenant by curtesy under the trustee was held to be also bound by the trust. Whether this was because he also was transplanted into the class coming in in the *per* or, as seems more likely, because the distinction between those in the *per* and those in the *post* was abandoned as no longer necessarily controlling, it is perhaps impossible to say.

By another notable decision of the same general period the old doctrine was similarly qualified at the expense of the trustee's execution creditors. In *Burgh* v. *Francis*, decided by Lord Nottingham in 1673,[30] a mortgage of land which was inoperative at law from lack of livery was perfected in equity and enforced against creditors of the mortgagor who, without notice of the attempted mortgage, had levied upon the land in the hands of the mortgagor's heirs. Formerly the creditors would have prevailed as well upon the ground that they came in the *post* as because of their want of notice. But both those grounds having been swept from under them by the recent rulings respecting dower and curtesy, the creditors were obliged to make their stand upon the claim that they were like purchasers in good faith of the legal title; which was ruled against them upon the ground that a general creditor must be deemed to have relied upon the debtor's general credit, and not upon the security of any particular property. Thus the old discrimination between privity arising by voluntary act and privity by operation of law was abandoned, and except purchasers of the legal title for value and without

awarded to husband of *cestui que trust*, which imports the previous extinction of the competing claim of the husband of the trustee.

[30] 3 Swanst. 536. Also reported in Rep. Temp. Finch 28, 1 P. W. 279, Nelson 183.

notice, everyone claiming in either way under the trustee was brought into subjection to the trust.

These three innovations, the direct effect of which was to protect the *cestui que trust* from injustice at the hands of husband, wife, or creditor of the trustee, also operated indirectly to facilitate the much needed protection of those who stood in corresponding relations to the *cestui que trust* from unjust law evasions at his hands. It was a peculiarity of their claims that recognition of them could become practicable only after a quietus had been put upon the similar claims upon the same lands by husband, wife, or creditor of the trustee. That change was not much sooner effected than equitable process against the trust property was awarded to the creditors of the *cestui que trust*, and the claim of husband of *cestui que trust* to curtesy was also sustained.[31] By what is universally regarded as an erratic and in a sense accidental result, the Chancellors, despite the changed conditions, adhered to their denial of dower to the widow of *cestui que trust*,—a defect long since almost everywhere cured by legislation.

Although these belated readjustments of the conflicting claims made upon the trust property by the husbands, wives, and creditors of the parties to the trust have been recognized universally as redeeming trusts from some of the worst of their inherited vices, their thoroughly revolutionary bearing upon the conceived nature of the respective rights of trustee and *cestui que trust* seems not to have attracted the attention that it deserves. Perhaps because it was only by ignoring silently a prime requisition of the old law of uses that the radical change in question was somewhat obscurely brought about. Down to the age with which we are now dealing, equity had

[31] Anon. cited in *Balsh* v. *Wastall*, 1 P. W. 445; Lewin, 13; Spence Eq. Jur., 502. And see note 29 *supra*.

adhered consistently to the theory that those only were bound by a use or trust who took the property with such an actual or presumed notice of it as would bind their consciences upon much the same principle as that upon which the conscience of the original feoffee or trustee was bound. That theory was consistent with the supposition that successors of the feoffee were pursued not by force of any real or proprietary right of the beneficiary, but by virtue of a train of personal rights against a succession of persons each acting unconscientiously. The binding of the husband, wife, and creditors of the trustee irrespective of notice, though all took by operation of law and in consideration of marriage or general credit, denoted clearly that the fictitious presumption of knowledge to which recourse had been had two centuries before for the binding of the innocent volunteer had outlived its usefulness, and that it was upon some ground fundamentally different and more comprehensive that successors in interest were now being bound.

If the new principle had at first some of the indistinctness characteristic of a juridical novelty, it became well defined at no very distant day. The new departure had its root in the recognition by equity of a then novel but now familiar type of divided ownership. Somewhat as the law recognized the divisibility of ownership between several persons whose estates might be joint, in common or by entireties, or might be present or future, or in tenancy or in seigniory, so from late in the seventeenth century, at least, equity conceived the divisibility of ownership into its formal and its substantial elements, so that the seisin or technical investiture might be in one person, while the rights of beneficial enjoyment were vested formlessly in another.

In the course of a few decades at the most, after the rulings above cited, the theory of equitable ownership

which was implicit in them took on the appearance of a defined and familiar doctrine. In 1706, in *Taylor* v. *Wheeler*,[32] Lord Cowper, in enforcing against general creditors of an insolvent an equity similar to that involved in *Burgh* v. *Francis*, put it upon the ground that the creditors "could be entitled to no more than what was properly the bankrupt's." In 1715, in *Finch* v. *Earl of Winchelsea*,[33] creditors had levied upon land as the property of a vendor after it had been sold and paid for but before it had been conveyed. The ground upon which Mr. Vernon supported the claim of the vendee or *cestui que trust* was that "the estate in equity would not belong to the trustee but to the *cestui que trust*." In *Hinton* v. *Hinton*, dower to the widow of a trustee was said by Lord Hardwicke to have been denied because its allowance "would be taking part of that estate the whole of which was in another, and against conscience."[34]

Had it been so disposed, undoubtedly equity might have bound the husband, wife, and creditors of the trustee, without recourse to the theory of equitable ownership in the *cestui que trust*. It might have reasoned that although the beneficiary of the trust had only a right to the land, yet upon a more advanced or refined view than was formerly taken it was against conscience even for persons whose claims were as meritorious as these to take it away from him. Thus there would have been added only new sections to the old train of rights *in personam*. It would be enough to say that this is the way equity did not reason. All the indications are that it was mainly due to the gradual intensification of the sense of proprietary right vested in the beneficiary that

[32] 2 Vern. 564.

[33] 1 P. W. 277.

[34] 2 Ves. Sr. 631, 634.

finally his right came to seem superior to that of these competitors. In practically every deliverance upon the subject from Lord Nottingham down, the equitable superiority of the beneficiary's right, when accounted for at all, is treated as a matter inferable from the fact that his right is in the nature of an ownership or a lien, as the case may be, in or upon the trust property.[35] It may be said also with safety that by the age with which we are dealing, it had become evident that to rank the trust as a vested interest in the land was the one comprehensive method of converting it from an instrument of abuse and evasion, into an agency capable only of serving the limited but legitimate purposes that still everywhere continue to justify recourse to our modern active or special trusts.

The only person deriving his title through the trustee whose rights as against the trust remain to be noticed is the King claiming the trust property as forfeited by the high treason of the trustee. The most obvious ground for awarding the forfeited property to the King freed from the trust was the early commonplace that there could be no equity against the King, as the Chancellor was merely acting for the King in adjudicating controversies between his subjects. In *Wike's* case,[36] in 7 Jac. 1, relief against the King was refused for that reason. That there was then other ground for the decision which would have been assigned if necessary is shown by the fact that Jenkins, writing just before the Restoration, de-

[35] In *Burgh* v. *Francis*, *supra*, according to his MS. as reported in 3 Swanst. 536, Lord Nottingham charged judgment creditors of the would-be mortgagor with the attempted but legally abortive mortgage, on the ground that the heir of the intended mortgagor was the trustee of the land descended, "which was charged with the equity of the mortgage."

[36] Lane 54.

scribed the King as free from the trust, because "in the *post*" and "paramount the confidence." [37] Doubtless that reasoning in favor of the King was deemed valid about as long as it seemed good in favor of the trustee's creditors, and not much longer, as the analogy between the two cases is clear. Although, owing to the rarity since the Restoration of forfeitures for high treason, the law of the subject has been imperfectly developed, there are two propositions respecting it that can be accepted with safety. The same shifting or abandonment of the lines between persons in the *per* and those in the *post*, and between successors by act of party and successors by operation of law, that made the trust effective against the trustee's husband, wife, and creditors, and culminated in the doctrine of equitable estates, also brought within its principle the King claiming to succeed by way of forfeiture for high treason, since he like them should take no greater interest than the trustee had. At the same time, the difficulties in pursuing the trust property in the hands of the King came to be regarded as due rather to remedial deficiencies than to lack of equitable right in the *cestui que trust*.[38] So that in the view of equity the forfeited land passed to the King subject to the trust.[39] Methods of enforcing the trust were afterwards supplied

[37] Jenkins, case 92, p. 190, and case 30, p. 245.

[38] 2 Spence Eq. Jur. 32, 33; *Penn.* v. *Lord Baltimore*, 1 Ves. 453; Lord Mansfield in 1 Eden at p. 229, and Sir Thomas Clarke, at p. 203; *Pawlett* v. *Atty. Gen.*, Hard. 465, 467, *per* Hale, C.B., and Atkyns, B. "In the case of a forfeiture to the Crown it was formerly held that there was no equity against the Crown, but in modern times the equity was admitted, though the *precise* nature of the remedy was never ascertained." Lewin on Trusts, 267–7 (11th Eng. ed.). And see *Hodge* v. *Atty. Gen.*, 3 Yo. & Col. 342, 346, and Snell's Eq. (15th ed.), 307.

[39] Lewin, 276.

ıtutes.[40] The statutory remedy operated to convert ı perfect equitable right what, owing to remedial ılties, had been a somewhat doubtful or imperfect

e equitable estate of the *cestui que trust*, however, either by equitable construction or by statute ne forfeitable for his own treason, unless indeed the te 33 Hen. VIII, c. 20, referring to uses, was applic- ılso to trusts, which curiously enough seems always ve remained an unsettled question.[41] The King's to forfeiture for treason of the trustee was never, the passage of the just cited statutes of George III Villiam IV, so effectually invalidated as fairly to call compensatory provision for forfeiture through the ɔn of the beneficial owner. Moreover, the same ness of operation that led to the final abolition of tures for treason and felony during the reign of Vic- was no doubt long a deterrent from either judicial ;islative action looking toward the extension of such tures.

us, one after another, were brought into subjection e trust all interests in the trust property derived ıgh the trustee either by his act or by operation of There were two classes of interests in the trust ɛrty not so derived: namely, those inuring to the of the trustee by way of escheat as feudally con- d, and those acquired by disseisin of the trustee. oking first at the former of these interests, their s with reference to the use or trust was free from t until there came over the conception of a trust

9 and 40 Geo. III, c. 88, sec. 12, authorized the King to relieve *stui que trust*, by grant under sign manual, and 4 & 5 Will. 23, sec. 2, made provision for the necessary conveyance by be appointed for the purpose by the court.

ewin on Trusts (1st Am. from 8th Eng. ed.), 818–20.

the radical change which we have seen taking place or at least culminating in the reign of Charles II, whereby the trust became binding upon the husband, wife, and creditors of the trustee, and came to be known as an estate in the land. Prior to that time confessedly, property escheated free from the obligation of any trust. After that, professional opinion upon the subject seems to have been so divided that it was still an open question when put at rest upwards of a century later by the statutes presently to be mentioned. The singular failure of equitable doctrine to crystallize upon this subject was probably due to the fact that nearly always the claimant of the escheat was the King. Four centuries had elapsed since the creation of new mesne lords had been made impossible by the statute *Quia Emptores*, during which a very large percentage of all lands in the kingdom had reverted to the King by forfeiture or escheat and had been regranted to be held directly of him. Even the few remote mesne lords that still subsisted were likely to find insuperable difficulties in proving their relations to the land.[42] These conditions had two effects. Litigation over escheats was rare, owing to the same difficulty in finding a remedy against the King which has just been noticed in connection with forfeitures for high treason. It seems also to have been the custom of the King to respect the just claims of the *cestui que trust* upon escheated lands. The provision in Statute 39 & 40 Geo. III, c. 88, sec. 12, authorizing him to respect such claims, recites that it was enacted because of doubts whether certain former statutes may not have deprived him of the power to do so.

That a point had been reached when, in principle, a trust upon escheating property would follow it into the

[42] 8 Sol. J. & Rep. 877.

hands of the lord, and that such would have been juridical as it was finally the legislative upshot conditions been favorable to a thorough threshing ou the subject, appear to be now fairly demonstrable positions, although there never has been any lacl reputable support for the contrary view.

Probably the earliest direct deliverance upon the ject was by Sir J. Trevor, Master of the Rolls, whc way of argument only, in *Eales* v. *England*,[43] in 1702 w the doctrine of equitable estates was still young, rema that "if the trustee die without heir, the lord by escl will have the land at law, yet subject to the trust he In 1846 in *White* v. *Baylor*,[44] it was definitely so adjuc in Ireland, which seems to be the only direct deci pro or con upon the specific point. In 1741 the ques was regarded by Lord Hardwicke as still an open o A little later in the notable case of *Burgess* v. *Whe* where the point was material only for purposes of a ment, the three eminent judges divided, Lord Mans holding that the trust was binding upon escheated l Sir Thomas Clarke holding the contrary, and I Keeper Henley not committing himself.

There is, however, a line of cases bearing indire upon the question which when fairly applied are c sive of it. When, as originally, feuds were granted for the life of the tenant, there remained in the lo true reversionary interest, and paramount title, w the tenant was incompetent to impair or incum So it was when afterwards the feuds came to run to tenant and his heirs, whether the heirs were deeme

[43] Prec. Ch. 200; 1 Eq. Cas. Abr. 384.

[44] 10 Ir. Eq. Rep. 54.

[45] *Reeve* v. *Atty. Gen.*, 2 Atk. 223.

[46] 1 Eden 177.

take by purchase, as they were at first, or by inheritance, as they were later. By the ultimate interpolation in the feoffment of the words "and assigns" after the word "heirs," the nature of the transaction was radically modified. The lord no longer had an interest either truly reversionary or truly paramount. Although he had a possibility of reverter in the event of there being at any time neither tenant, heirs, nor assigns to perform the stipulated services, the land would come back to his hands not as it left them, but as it was left after running the gauntlet of the absolute powers of disposition with which the tenant, his heirs, and assigns had been clothed. For it became recognized law that the power to assign included the powers to incumber and devise. In determining in any given case what was the extent of the interest left available for escheat to the lord, were the principles of the common law alone to be consulted, or might the tenant's interests available for escheat be expanded or contracted by appeal to the doctrines of equity? It goes without saying that the benefits of equity must be either accorded or denied to both parties alike. If equity would operate in some cases to enlarge the escheatable interest and in others diminish it, it must be permitted to do both or neither.

Whether equity could be appealed to for such purposes was the question presented in 1685 in *Thruxton* v. *Attorney General*.[47] It was the case of a fee owner who died without heirs or devisees after having carved out of his fee a hundred-year term to be held in trust for such purposes as he should appoint and, in the absence of appointments, to attend the inheritance. Although at law the escheatable interest of the deceased had been curtailed by the alienation of the hundred-year term to

[47] 1 Vern. 340.

ıstee, subpoena was held to lie to secure to the
ıe benefit of the term thus equitably attendant upon
:heating fee. The authority of the decision remains
aired; and if in gauging the escheatable interest
heirless tenant his trust relations are to be con-
l, they must be equally reckoned with whether
ıtus is that of *cestui que trust* or trustee.

Thruxton case was followed by Wigram, V. C., in
when by analogy to it a lord taking the freehold by
.t from one who had given a mortgage upon a term
rs in the property was held to take also the equity
emption from the mortgage.[48]

rinciple to which this was in the nature of a recipro-
as indeed even older than the *Thruxton* case. For
8, in *Pawlett* v. *Attorney General*,[49] it had been con-
l that the lord taking the legal title by escheat on
of the mortgagee of the land without heirs must take
:t to the mortgagor's equity of redemption. The
ı assigned for this conclusion was that an equity of
ption is an equitable estate in the land. This
ted unmistakably: (1) that the lord's title upon
ıt is not paramount or elder in such a sense as
:arily to prevail against equities by which the legal
ıad come to be affected while in the hands of the
t; (2) that an equity which constitutes an equitable
will follow and bind the land in the hands of the
aking by escheat, just as will an outstanding legal
.brance or minor legal estate. Probably, therefore,
ould have been accepted as decisive of the force of
generally against lords taking by escheat had
octrine been developed then as it is now, that
stui que trust has an estate in the land. That it was

'scount *Downe* v. *Morris*, 3 Hare 394, 404.
ırd. 465.

not then so developed is evidenced, among other ways, by the opinion of Hale, C. B., in that case; for by way of dictum, he expressly contrasts an equity of redemption and a trust as being the one an estate and the other not an estate in the land. In all of which he was justified by the law of the day.

If when Lord Hale thus spoke, the right of the *cestui que trust* had ever been ranked as an equitable estate in the land, it has escaped the writer's notice. That conception was then close at hand but had not arrived, or at all events had not yet become generally current. It will be observed that chronologically the *Pawlett* case fell midway between the binding of the trustee's wife by the trust and the binding of the trustee's husband and creditors; and it was not until the latter were bound that in culmination of the long line of developments already traced and others yet to be noticed, the trust was definitely reinterpreted to be an estate in the land.

From the time of that new departure, it was a foregone conclusion that sooner or later, though difficult to foresee how soon or how late, the line that the dictum of Sir Matthew Hale had drawn between the equity of redemption and the trust must be recognized as having been effaced, so as to leave the latter in the same class with the former with respect to escheating lands. There then remained no vestige of foundation in either morals or logic for discriminating between them in cases of escheat, or for according to the trust any less force against the lord than against the wife, husband, or creditors of the trustee. However, as owing largely to the peculiar conditions already indicated the subject failed to clarify as a matter of equitable doctrine, it was finally put at rest by Parliament as already noticed, at first through acts confirming the King in his practice of recognizing the claims of the *cestui que trust*, and later by acts expressly authorizing

the Court of Chancery to decree the conveyances necessary for that purpose.[50] These statutes, if not simply declaratory of an existing equity, were in the nature of a legislative extension of one, since which, if not before, a trust is as good against a lord taking the property by escheat as against the original trustee. So that the supposed exemption of the lord from the force of a trust can no longer be appealed to in derogation of the proprietary character of the beneficial interest.

The normal substitute right of the lord to take by escheat the equitable estate of the *cestui que trust* upon his death without heirs, equity had been incapacitated to recognize by the decision in *Burgess* v. *Wheate*,[51] which, by placing the right of escheat upon the absence of any one to perform the services rather than upon the absence of heirs, had made it inapplicable to equitable estates, as the trustee was always present to perform the services. Nor had equitable estates ever been so far incorporated into the system of tenure as to be deemed escheatable even apart from that particular difficulty. The lord's just claim to a compensatory right to the escheat of equitable estates was finally recognized by sec. 4 of the Intestate's Estate Act of 1884.

With these problems respecting the peculiar rights of the feudal lord, our American equity has never been vexed, as our law of escheat is not of feudal derivation but rests on the universal principle which entitles the sovereign to all unclaimed property. With us confessedly the state, in the absence of heirs, succeeds to the title of a deceased owner, without any claim of paramount reversionary or seigniorial interest in itself, and so has always

[50] Stats. 39 & 40 Geo. III, c. 88, sec. 12; 59 Geo. III, c. 94; 4 & 5 Will. IV, c. 23; 13 & 14 Vict., c. 60; 1 & 2 Vict., c. 69.

[51] 1 Eden 177, 201, 212, 242–7, 251.

taken in acknowledged subordination to outstanding trusts — a high tribute to the actuality of equitable ownership. And this principle and its correlative, the doctrine that equitable estates should be escheatable, have been recognized in the statutory regulations of the subject in nearly all of the states.[52]

Thus finally we reach the case of the simple trespasser upon the trust property, and the case of the disseisor and the like—the stranger who without any relation of privity to the trustee takes adverse possession of the land. As against them, is the *cestui que trust* so deficient in rights as to make inappropriate the ascription to him of an equitable ownership? Practically he has never been defenseless against any of these intruders since the early day when the defense of the land came to be reckoned a duty which by subpoena the trustee, *nolens volens*, could be compelled to perform. But it may be argued that this denotes, not any right in the *cestui que trust* as against such intruders, but only that for his benefit equity compels an exercise of the rights of the trustee. Such no doubt was the view originally taken. It was, however, but a transitory view, for experience seems to show it a law of thought that rights generally, whether substantive or remedial, held by one person, which he is compellable to exercise for the use or benefit of another, tend gradually to be deemed the rights of that other. The same intellectual processes that have developed the *cestui que trust* into equitable owner of what were originally the trustee's rights of beneficial enjoyment have invested him equitably with what were originally the trustee's remedial rights against wrongful intruders. The action for trespass or in ejectment, though in the name of the trustee, is seen to be for the use and benefit

[52] Stimson's Am. Stat. Law, secs. 1151, 1152.

of the *cestui que trust*, who is the real party in inte
and who comes ultimately to be thought of as in s
stance or effect suing the trespasser or disseisor in
trustee's name. So that now in case of refusal b
trustee to bring an action proper for the collection,
tection, or recovery of trust property, action in
name may by order be authorized to be brought by
cestui que trust,[53] or the latter may be authorized to
in equity in his own name, making the trustee a p
defendant.[54] Indeed, generally now without spe
order the *cestui que trust* may, in equity, in his own na
have relief though legal in character whenever, owin
the trustee's refusal to sue, or to his incompetency, or
vacancy in the office, or to other special circumstan
relief cannot conveniently be pursued through
trustee.[55] And even apart from these special difficul
if the requisite relief against the wrongdoer is equit
in character, such as an injunction against a tres
that is destructive of the substance of the estate w

[53] *Sharpe* v. *San Paulo Ry. Co.*, L. R. 8 Ch. App. at p. 610.

[54] *Meldrum* v. *Scorer*, 56 L. T. N. S. 471. See *Jerdein* v. *B*
2 J. & H. 324, and Laws of England, vol. 28, pp. 172, 183, and
cited.

[55] *Western Ry. Co.* v. *Nolan*, 48 N. Y. 513, 518; *Robinso*
Adams, 81 App. Div. N. Y. 20, 25; *Anderson* v. *Daley*, 38 App.
N. Y. 505, 510; *Chicago, etc., Ry. Co.* v. *Fosdick*, 106 U. S. at p
Hammond v. *Messenger*, 9 Sim. 327; *Arnett* v. *Bailey*, 60 Ala.
438; *Zimmerman* v. *Makepeace*, 152 Ind. 199; 1 Perry on T
(6th ed.), sec. 328, note.

"The bondholders [secured by trust deed] are the real pa
in interest; it is their right which is to be redressed, and thei
which is to be prevented." *Ellinger* v. *Persian Rug Co.*, 142 N
189. "If for any cause the legal ownership could not be
effectual for the protection of the wife's equitable right, the c
would have administered appropriate equitable relief." *Richa*
v. *Lewis*. 22 Mo. 495.

there are not conflicting claims of title or the injunction is temporary, the *cestui que trust* may have it in his own name.

The plain meaning of all this is that the old linked up rights of trustee against invading stranger and of *cestui que trust* against trustee have fused in the melting pot of experience; that the right to redress against the invader has come to be regarded in equity as essentially the right of the *cestui que trust*, and none the less his right because in deference to the common law it is pursuable only in common law courts, and therefore only in the name of the common law owner, so far as in that way the ends of justice can be conveniently and adequately attained.

Although the *cestui que trust* is thus assured of the benefit of all appropriate legal and equitable remedies necessary for the protection of his beneficial interest against trespass and dispossession, there are those who find in the intermediacy of the trustee, even when thus qualified as being non-essential, enough to deprive the *cestui que trust* of that directness of relation to the property which no doubt is a very general characteristic of ownership. In that connection, however, the essential matter is not directness of remedy, but immediacy of right. The presence of the former is important only so far as it may be due to the absence of the latter. And since in modern equity a *cestui que trust* has, demonstratively as we have seen, a direct right against trespassers and disseisors capable of direct enforcement when necessary, its proprietary character is not impaired by the fact that owing to our uniquely divided jurisdiction his remedy, so far as practicable, must be sought through or in the name of his trustee as a real or nominal intermediary, as a remedial device for gaining access to the legal forum appropriate for the trial of trespasses and disseisins.

The beneficial interest of the *cestui que trust* being thus amply protected against disseisins, it is immaterial

for our purposes whether or not he may at his op hold a disseisor liable as trustee. As a criterion of p prietary right, several remedies against a disseisor wc be no better than one. Yet a glance at the subject r not be amiss.

About the close of the sixteenth century, in the cas *Sir Moyl Finch*,[56] it was said of a disseisor that he "subject to no trust, nor was any subpoena maintain against him, not only because he was in the *post, because the right of inheritance or freehold was determin at the common law and not in the Chancery*," which is same thing that a few years before had been said Popham, C. J., in *Chudleigh's* case.[57]

Singularly, the specific question seems never to h been re-examined judicially from that day to this, r withstanding the subsequent classification of the ri of the *cestui que trust* as an equitable estate and shaking up that the principle of privity received du the reign of Charles II. This no doubt is due largel the fact that since the defense of the land became of the enforceable duties of a trustee, the ability of *cestui que trust* to compel the trustee to eject a wron invader has dispensed with the practical necessity any more direct remedy against the latter. Ejec would be the natural and favored remedy agains disseisor and his kind, however clear might be the al native remedy of adopting him as trustee, and existence of the former remedy must have tended retard the development of the latter by making it t unnecessary to the ends of justice. The moral neces that led to the attenuation or abandonment of the conception of privity in order to bring into subjec

[56] 4 Inst. 85.

[57] 1 Rep. 139, b.

to the trust the wife, husband, and creditors of the trustee has not been felt therefore in dealing with the case of the disseisor. It is probably fair to say that so far as the subject has been adverted to in professional thought, which is to a very limited extent, the general current of assumption has been that the doctrine of *Sir Moyl Finch's* case never having been specifically overruled still holds or may hold good — although never reaffirmed: that the later developments, while binding as privies to the trust many not falling within the circle of privity as originally defined, have not imported an entire abandonment of privity to the trustee as a limitation upon the force of a trust.

If it is still true at this day that subpoena will not lie against the disseisor to compel him to perform the trust, the question yet remains whether now this is for the first of the two reasons assigned in the *Finch* case, or for the second, or for both. Is it because equity refuses to raise a trust against the disseisor owing to lack of the necessary privity, or only because the latter's claim of paramount title raises an issue upon which he is entitled to a jury trial in a court of law? It cannot be said with certainty that something like the second of these reasons is not still effective to prevent the charging of a disseisor as trustee, even though the limitations of the trust to privies may have been abandoned. It is conceivable for instance that the situation might be regarded as analogous to those in which equity refuses to permanently enjoin a trespass or act of waste, no matter how destructive or irreparable, committed by one in possession claiming title, and enjoins only long enough to enable the plaintiff to try his title at law.[58]

[58] *Erhardt* v. *Boaro*, 113 U. S. 537, 539; *Leroy* v. *Wright*, 4 Sawy. 530, 535.

In the absence of some such special objection as having regard to the form of the remedy or to the for the writer believes the time not far away when it wil recognized that there is no subsisting reason for not ch ing the disseisor as trustee at the option of the benefici While space is not available for a full discussion of subject, two recent doctrines bearing upon the ma from different standpoints may be noticed as stror premonitory of the suggested change of view. They the doctrines that the equity created by a negative co ant restricting the use of land is binding upon a disse of the covenantor,[59] and that equity will charge a t as trustee of the chattels he has stolen and of ot properties into which they may have been converte even though the conversion is into land.[61] One rea assigned in the Court of Appeals for the former of t doctrines was the injustice of so limiting the eq "that the squatter could as against the covenantee s cessfully plead his own trespass as putting him i better position than if he had gone upon the land right." Similarly the second doctrine was evolved by following reasoning in the first of the New York ca "It would seem to be an anomaly in the law, if the ow who has been deprived of his property by a larc should be less favorably situated in a court of equity respect to his remedy to recover it, or the property i which it had been converted, than one who by an ab of trust has been injured by the wrongful act of a tru to whom the possession of trust property has been c fided. The law in such a case will raise a trust *in invi*

[59] *Nisbet-Potts Contract*, 1905, 1 Ch. 391; affirmed C. A. in 1 1 Ch. 386.

[60] *Newton* v. *Porter*, 69 N. Y. 133, 139; *Lightfoot* v. *Davis*, N. Y. 261, 270.

out of the transaction for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense."

Although this reasoning is now applicable in full force to the disseisor of a trustee, it is important to notice that it did not become applicable until long after the period of the *Finch* decision. At the date of that case, the conception of privity for the purposes now in hand was such that the drawing of a line between privies of the trustee and a disseisor, to the advantage of the latter, was explicable morally. For then, with the exception of the heir whose peculiarity of status has been noticed, only those were bound as privies who came in in the *per*; *i.e.* by the voluntary act of a faith-breaking trustee, and with an actual or legally presumed knowledge of the trust, which made them the accomplices in his perfidy. The disseisor had no connection with any breach of trust and there was no inconsistency in distinguishing between his wrong and the corrupt breach of faith in which everyone was a participant who was then ranked as a privy, excepting only the innocent purchaser for value of the legal title, and the confessedly eccentric case of the heir.

But since the time when during the reign of Charles II the theory of the subject was rebuilt, the old distinction between those in the *per* and those in the *post* ignored, and the trust held binding upon persons succeeding to the trustee's estate by operation of law and without breach of faith on the part of anyone, as in the case of the wife, husband, or creditor of the trustee, discrimination in favor of disseisors as compared with this new class of innocent privies has been destitute of moral basis. However, as remarked, though a disseisor should not be chargeable as trustee, the *fact* would not be inconsistent with the proprietary character of a *cestui que trust's* right, as the latter is protected by other remedies.

We have now followed the right of the *cestui que trust* from its inception as a right against a particular person through the prolonged processes of development that gradually have made it good against the world generally, and so have raised it to the rank of a right *in rem*, according to the standards of general jurisprudence rationally construed and applied. We have identified as the three principal phases of the development: (1) a progressive refinement in the standards of fair-dealing enforced by equity against successors in interest of the trustee, until all such successors were bound except innocent purchasers for value of the legal title; (2) a reconception of the right to redress for trespass upon or disseisin of the trust property, as essentially the right of the *cestui que trust*, enforceable by him at law in the name of the trustee, or in equity in his own name whenever, for any reason, action by the trustee himself for the *cestui que trust's* benefit is not a reasonably available remedy; and (3) the adoption, broadly, of the doctrine that a trust divides ownership into its formal and its substantial elements, of which only the former pass to the trustee, while the latter, constituting true or beneficial or equitable ownership, vest in the *cestui que trust*.

In the first two of these developments we have the product of the interworking of equity's compulsory process with her exacting morality and with her searching pursuit of substance with indifference to form, while in the third we have the theoretical rounding out of the meaning and effect of the first two of the developments, and the modern reinterpretation of the trust relation in their combined light. How literally expressive to equity's true meaning the doctrine of equitable ownership is, how variously fortified the doctrine is against reduction to a mere figure of speech, have incidentally appeared in

the course of this review. There remain a few corroborative points yet to be noticed.

If the right of the *cestui que trust* were really a right *in personam*, it would follow of course that in equity as well as at law all elements of ownership, both formal and beneficial, must be vested in the trustee, and that upon the death of the *cestui que trust* without heirs, they must remain in the trustee, freed from the extinct trust obligation. The acknowledged rule is the contrary of this; and proceeding upon the principle that only the formal elements of title are in the trustee, the beneficial elements under such circumstances are held to escheat to the estate as unowned property.[62] The significance of this rule is not impaired by the fact that in England it is not applied to lands, as that idiosyncrasy is due, as already noticed, to the peculiarly feudal interpretation there placed upon the law relative to the escheat of lands, whereby the condition of escheat is held to be the absence of any person to whom the lord can look for the performance of the services.[63] As he can look to the trustee for such performance, the death of the *cestui que trust* without heirs works no feudal escheat, and escheat of lands as *bona vacantia* has not been established as a principle of English law. Personalty held in trust there is, however, recognized as *bona vacantia* when the trust is terminated either by death of the *cestui que trust* without heirs, or by fulfillment of the trust without exhaustion of the trust property and with no one living in whose favor a trust as to the residue can result.[64]

One noteworthy token of ownership in the *cestui que trust* has been the gradual fading out of the appearance of

[62] 1 Perry on Trusts (6th ed.), sec. 327 and cases cited.

[63] *Burgess* v. *Wheate*, 1 Eden 177, 201, 212, 242–7, 251.

[64] *Middleton* v. *Spicer*, 1 Bro. C. C. 201; Underhill on Trusts (7th ed.), 207.

ownership in the trustee, until the latter has come to resemble not so much a proprietor as a functionary used by the courts in administering the trust property for the benefit of the *cestui que trust* as its real owner. The powers of control exercised by the Court of Chancery over the trustee and trusteeship in the interest of the *cestui que trust* proved, when fully unfolded, to be incompatible with any theory of real or substantial ownership in the trustee. Nor was this only because in an ownership without the benefits of ownership, the substance of the relation is wholly missing. Power to control the trustee in his dispositions of the property proved to carry with it the power to remove him from its custody when disobedient or unfaithful, and to nominate his successor. The power to fill a vacancy thus arising was held applicable to a vacancy occasioned by failure of the creator of a trust to name a trustee, or by refusal or incapacity of the person named to act. Thus it is that equity will never suffer a trust to fail for want of a trustee, will shift the office from hand to hand as justice to the *cestui que trust* may seem to demand, irrespective of complete lapsings of the formal title, and in cases of necessity will administer the property directly without the instrumentality of a trustee. These juridical manipulations of the trusteeship are suggestive that the trustee is something very different from veritable owner; and every erosion from the ownership of the trustee has meant a corresponding accretion to the ownership of the *cestui que trust.*

Those who deny that the *cestui que trust's* right is proprietary generally insist that there are inherent in the nature of the equity jurisdiction and in the personal character of the process, limitations that incapacitate equity from creating rights *in rem.* The inaccuracy of this assumption is evidenced by several doctrines not dependent upon the trust principle, though generally of

such a nature as to be reinforceable by that principle as occasion may arise. Among them is the doctrine of the equity of redemption. At its inception a mere boon from the Chancellor, or a personal privilege[65] of redeeming mortgaged lands from forfeiture by reason of default in payment at the stipulated date, it had grown before the middle of the seventeenth century into "a right inherent in the land,"[66] *i.e.* into an interest then somewhat indeterminate and nondescript no doubt, yet in the nature of an estate. During the ensuing century that estate of the mortgagor became well defined as the same that he had before executing the mortgage, except that it is now equitable because cognizable only by a court of equity, the estate remaining with him upon the principle that in the estimation of equity the mortgage, despite its language of actual conveyance, was operative only to impose a lien.[67] Thus, however radically the equity of redemption may differ from an ordinary trust estate in mode of origin and development, it illustrates aptly both the capacity and the tendency of a personal right touching realty, conferred as a boon by the Chancellor, to develop into a veritable estate in the land to which it relates.

Another instance of the raising of an equitable estate by denying, though upon different grounds, the efficiency in equity of a conveyance operative at law, is seen in the case of a deed obtained by fraud, in which case the vendor in the view of equity "*remains* the owner."[68]

[65] *Roscarick* v. *Barton*, 1 Ch. Cas. 217. See Lord Blackburn's remarks in *Jennings* v. *Jordan*, 6 A. C. at p. 714.

[66] *Pawlett* v. *Atty. General*, Hardr. 465.

[67] *Casborne* v. *Scarfe*, 1 Atk. 603; *Fairclough* v. *Marshall*, 4 Exch. Div. 37; *Van Gelder* v. *Sowerby Society*, 44 Ch. Div. 374, 390, 393; *Strode* v. *Russell*, 2 Vern. 625.

[68] Lord St. Leonards in *Stump* v. *Gaby*, 2 DeG. M. & G. 630; *Gresley* v. *Mousley*, 4 DeG. & J. 78, 92.

One of the most decisive tests to which the meaning of equity in affirming the existence of equitable interests in land has been subjected occurred in 1882, in *London & S. W. Ry. Co.* v. *Gomm.*[69] A conveyance of land contained a contract by the grantee for himself, his heirs, and assigns to reconvey at a stipulated price whenever the vendor company should need the land for its business. The suit was to enforce the contract against an assign of the vendee who had taken with notice of the contract, and who defended upon the ground that the contract was void as creating a perpetuity. By the lower court, this defense was overruled upon the theory that contracts to buy or sell land do not run with the land and are not binding upon an assign unless he takes with notice; that they are not, properly speaking, estates or interests in land, and are therefore not within the rule against perpetuities.[70] The Court of Appeal broadly negatived the supposition that the defendant could be charged upon the theory that he took with notice of a personal contract to sell,[71] and held that the contract was capable of binding him only because it invested the contractee with an interest in the land, and that it was therefore void as creating a perpetuity.[72] It was said that in the view of equity it was the same as though the estate had been conveyed subject to the conditional limitation that it should revest in the vendor whenever he should pay to the vendee, his heirs, or assigns a specified sum.

Equally significant are the cases already cited in another connection[73] holding an executory contract for the sale of a ship to be an instrument transferring the

[69] 20 Ch. Div. 562.

[70] *Ib.* 576.

[71] *Ib.* 580.

[72] *Ib.* 582–8.

[73] See chap. v, *supra*, where the cases are more fully stated.

property in the ship within the meaning of a statute requiring instruments of transfer to recite the certificate of registration,[74] and holding valid an equitable charge although of a kind prohibited by statute passed between the date of the contract for the charge and the time of the suit, overruling a contention that an equitable charge is only a right to secure a legal charge by specific performance, and that what the court was asked to do was to create a charge contrary to the statute.[75]

The capacity of an equitable right to become proprietary has been proven nowhere more decisively than in connection with the evolution of equitable easements which has occurred wholly since about the middle of the last century. Down to that time a covenant by a landowner restricting the uses to which his land should be put, analogously to the original conception of a trust obligation, was deemed purely personal to the covenantor and not binding upon his successors in the occupation of the land. Then, by Lord Cottenham in *Tulk.* v. *Moxhay*,[76] the covenant was held binding upon one purchasing property with notice of it. Then gradually there were applied the principles of presumptive and constructive notice that had been worked out in connection with trusts and other equitable interests, with the result of binding by the covenant all who succeeded to the covenantor's estate either gratuitously or with notice; *i.e.* all privies except innocent purchasers for value of the land.

It was perhaps the general supposition that this represented the maximum force of the restrictive covenant. But when the question was presented it was held by Far-

[74] *Hughes* v. *Morris*, 2 DeG. M. & G. 349.

[75] *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 547.

[76] 2 Phill. 774.

well, J., and affirmed by the Court of Appeal, as heretofore noticed, that all subsequent occupants of the land irrespective of privity are bound, except innocent purchasers for value; that the covenant binds the land itself, and not merely the consciences of the covenantor and his successors in interest; that the right that it creates is in the nature of an equitable easement which, without reference to his knowledge of it, is binding even upon a squatter or disseisor before the statute of limitations has run in his favor, and even afterwards when during the limitation period the occupancy has been such as not to involve a violation of the covenant.[77]

To the judges who decided the above cited *Gomm* case and the *Nisbet-Potts Contract* case, the profession owe

[77] *Nisbet-Potts Contract*, 1905, 1 Ch. 391; affirmed C. A. 1906, 1 Ch. 386. See chap. v *supra* for extracts from opinions. To many members of the profession these decisions appear to have come as a surprise. By the Solicitors' Journal and Reporter they were criticized as "in fine disregard of old real property law," and were said to have occasioned "uncommon interest and prodigious discussion at Lincoln's Inn." By the Law Quarterly, on the other hand, they were welcomed as "plain good sense." Vol. 22, p. 124. To the writer their principle appears to have been implicit in conceptions of equitable right that have been administered by equity from the time of Charles II. Those desiring to pursue the subject will find the decisions adversely discussed in editorials in the Solicitors' Journal, vol. 49, p. 275, vol. 50, pp. 123, 186, and in articles by Mr. T. Cyprian Williams in vol. 51, pp. 141, 155. Mr. Williams, while criticizing the Court for holding the squatter bound, insists, and justly as it seems to the writer, that the argument for binding him by an equitable estate is even stronger than that for holding him to a restrictive covenant. For, as Mr. Williams says (p. 155), "of all equities, an express trust imposed on the owner of land to hold it for the use of another in fee, is the most powerful, the most intense, and the most adverse to the owner's legal right." He further points out that if occasion were to arise, the doctrine of restrictive covenant could be subsumed appropriately under the doctrine of trusts, 143, 155.

a debt of gratitude for their explicit renunciation of the anachronous theory that it is because of actual or implied notice that equity binds an assign of property by a covenant or obligation of his assignor respecting it; a debt which is perhaps all the greater, rather than less, because the renunciation was overdue by upwards of two centuries. It was a theory to which early equity had recourse in order that the then novel liabilities it was introducing might be subsumed under the principle of fraud. At the best it was a scaffolding to facilitate the erection of a doctrine of equitable interests and estates, and has been only confusing and obscuring rubbish since that doctrine was practically completed shortly after the Restoration, so as to bind irrespectively of notice all successors in interest except innocent purchasers for value of the legal title. The bearing of notice in the case of a trust is identical with its bearing in case of a restrictive covenant, and that, confessedly now, is no bearing at all except in determining whether a given assign is a purchaser for value and in good faith of the legal title. "The question of notice to the purchaser has nothing whatever to do with the question whether the covenant binds him, except insofar as the absence of notice may enable him to raise the plea of purchaser for valuable consideration without notice."[78] These two decisions avouch what for a long time has been manifest, that in the view of modern equity the trouble with one who takes trust property as an innocent volunteer is not that he is conclusively presumed to have taken fraudulently, but simply that he has no affirmative equity with which to unclasp the prior hold of the *cestui*

[78] 2 Dart's Vendors & Purchasers (7th ed.), 769. A full review of the history of this subject in its connections with restrictive covenants will be found in the opinions in *London County Council* v. *Allen*, 1914, K. B. Div. 664–72, and in 49 Sol. J. & Rep. 275.

que trust or restrictive covenantee upon the land. The same substantially is true even of the purchaser with notice. Of him it is now enough to say that the affirmative equity which otherwise would have arisen from the payment of his purchase money is spoiled by his guilty knowledge. From the sheer fact of being thus left without equity, he is defenseless against the equitably vested interest of the *cestui que trust* or restrictive covenantee.

One other feature of the decisions on the *Nisbet-Potts Contract* is worthy of remark. In mechanical adherence to the old formula, it has always been customary to describe an equitable lien or charge as binding upon the party against whom it originally arises and all persons claiming under him as volunteers or with notice. These decisions show the formula to be too narrow and that such a charge or lien is not dependent for its force upon relations of privity. For the reasoning of Farwell, J., in the lower court, which was approved unreservedly by each member of the Court of Appeal, inferred the efficiency of a restrictive covenant against a disseisor largely from its analogy to an equitable charge upon land, the freedom of the latter from restriction to privies being assumed throughout.

The conclusions that seem to be justified by this too protracted review are that, as now conceived and treated, equitable estates and interests generally are fairly classifiable as proprietary rights according to the standards of general jurisprudence; that, what is of more practical importance, they are, whether rightly or wrongly, consistently so conceived, reasoned about, and dealt with by equity; that the gradual development of the old personal right of the beneficiary of a trust into the proprietary right with which he is now accredited is one of equity's most signal and beneficent accomplishments, whereby

an institute once good for little else than illicit purposes of evading law by detaching the benefits of ownership from its burdens has been made over into a new and qualified but legitimate ownership, in which burdens and benefits are reunited, with only for purposes of convenience the powers of active management detached; and that equity is confused rather than elucidated by those who would reinstate archaic conceptions of the *cestui que trust's* right, upon the supposition that in all of the multitudinous reiterations of the doctrine of equitable estates during the last two centuries, it has spoken either mistakenly by or way of indulgence in a mere figure of speech.

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